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REPORTS

OF

CASES AT LAW AND IN CHANCERY

ARGUED AND DETERMINED IN THE

SUPREME COURT OF ILLINOIS.

VOLUME 219.

**CONTAINING CASES IN WHICH OPINIONS WERE FILED IN DECEMBER,
1905, AND FEBRUARY, 1906, AND CASES IN WHICH REHEAR-
INGS WERE DENIED AT THE FEBRUARY TERM, 1906.**

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ISAAC NEWTON PHILLIPS,
REPORTER OF DECISIONS.

BLOOMINGTON, ILL.
1906.

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JUSTICES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

JAMES H. CARTWRIGHT, CHIEF JUSTICE.

BENJAMIN D. MAGRUDER,	}	JUSTICES.
JACOB W. WILKIN,		
CARROLL C. BOGGS,		
JOHN P. HAND,		
JAMES B. RICKS,		
GUY C. SCOTT,		

ATTORNEY GENERAL,
WILLIAM H. STEAD.

REPORTER OF DECISIONS,
ISAAC NEWTON PHILLIPS.

CLERK,
CHRISTOPHER MAMER.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF ILLINOIS.

LIVINGSTON COUNTY BUILDING AND LOAN ASSOCIATION

v.

ANNA L. KEACH *et al.*

Opinion filed December 20, 1905.

1. EQUITY—*when a bill to locate boundary line cannot be maintained.* Where, as a result of a boundary line dispute between the owners of lots on each side of a person's property, the latter is deprived of the full width of his lot, he may bring ejectment against the one of such abutting owners who is encroaching on his property, but he cannot maintain a bill in equity to have the court ascertain which of such abutting owners is in the wrong and render a decree fixing his boundary line accordingly.

2. SAME—*when equitable jurisdiction is exercised.* Equitable jurisdiction is exercised only when the legal remedies are inadequate and there is a necessity for the interposition of equity to prevent unnecessary, annoying and harassing suits.

3. SAME—*when bill cannot be sustained as a bill to remove a cloud.* A bill against the two adjoining neighbors of the complainant, one or the other of whom is alleged to have encroached upon his land, cannot be maintained as a bill to quiet title, where the bill alleged that both defendants admit complainant has title to a strip of land of certain width between their lots, the only controversy being as to what are its true boundaries.

WRIT OF ERROR to the Circuit Court of Livingston county; the Hon. GEORGE W. PATTON, Judge, presiding.

A. C. NORTON, and R. B. CAMPBELL, for plaintiff in error.

C. C. & L. F. STRAWN, and WHITE & TUESBURG, for defendants in error.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

Plaintiff in error, Livingston County Building and Loan Association, filed its bill in equity in the circuit court of Livingston county against defendants in error, Anna L. Keach and Fanny L. White. The court sustained a demurrer of the defendants to the bill and dismissed it at complainant's cost.

The facts stated in the bill as a basis for the relief asked for are, that the complainant is the owner of the south sixty feet in width of lot A, in Babcock's addition to Pontiac, which was laid out and platted in 1857 by Billings P. Babcock, who was then the owner of the premises; that the defendant Anna L. Keach owns the land adjoining complainant's said property on the north and defendant Fanny L. White owns the land adjoining complainant's said property on the south; that both said defendants admit that complainant is the owner of and has the legal title to said south sixty feet in width of lot A, but they disagree as to where the boundary lines of the lot are; that defendant Anna L. Keach claims that the southern boundary of lot A is identical with the north line of block 6, in the city of Pontiac, while the defendant Fanny L. White insists that said southern boundary is seven feet and eight inches further north; that the defendant Anna L. Keach has taken possession of the land up to the north line of complainant's property as she claims it to be, and Fanny L. White

has taken possession on the other side up to the south line as she claims it to exist; that defendants have left to complainant only fifty-two feet and four inches in width, while they both concede that between the correct boundary lines there is a distance of sixty feet; that on account of the plat being ambiguous as to the starting point it is not clear whether the southern boundary of complainant's property is identical with the north line of block 6 or whether it is seven feet and eight inches north of the north line of said block. The prayer of the bill is that the court shall ascertain and fix the true boundary lines of complainant's property, settle the conflicting claims of the defendants in respect to the property and the location of such lines, and settle and declare the rights and titles of the parties to the strips of land in dispute.

It is contended that the court erred in not sustaining the bill as a bill to remove a cloud and quiet title, and also for the reason that a resort to equity was necessary to avoid a multiplicity of suits. If the bill were a bill to remove a cloud and quiet title it could not be maintained, for the reason that the complainant was not in possession of the premises in dispute and they were not vacant or unoccupied. (*Gage v. Curtis*, 122 Ill. 520; *Johnson v. Huling*, 127 id. 14.) But there is no cloud upon complainant's title to be removed. The bill alleges that both of the defendants admit the title and ownership of the complainant, and that the only controversy is whether the property is located in one place or another. While the prayer of the bill is broad enough to involve a freehold estate, the averments do not show that there is any adverse claim of title which is apparently valid and which constitutes a cloud.

Complainant has a complete remedy at law, and for that reason cannot resort to a court of equity. The strip seven feet and eight inches wide on the north is in the possession of Anna L. Keach, and if it is a part of complainant's sixty feet there is a remedy against her by ejectment. If the seven feet and eight inches on the south side, in the possession

of the defendant Fanny L. White, is a part of complainant's lot the law affords the same remedy against her.

There is no equitable ground for relief to prevent a multiplicity of suits. According to the bill but one of the defendants is wrongfully in possession of the complainant's property, and, with the facts ascertained, but one action is necessary. The equitable jurisdiction is only exercised when legal remedies are inadequate and there is a necessity for the interposition of equity to prevent unnecessary, annoying and harassing suits. (14 Ency. of Pl. & Pr. 219.) There is no such condition shown by the bill.

The bill does not allege where the true southern boundary is or where complainant's property is located, but prays the court to investigate and determine that question. The bill is not a bill of interpleader, but is brought to enforce property rights and interests of the complainant. In such a case it is necessary for the complainant to aver and prove such facts as will establish its rights, and it is not the province of a court of equity to take up the burden of discovering the facts necessary to show where complainant's property is located. The court was right in sustaining the demurrer.

The decree is affirmed.

Decree affirmed.

FRANK M. MUNGER *et al.*

v.

JOHN V. CROWE *et al.*

Opinion filed December 20, 1905.

VENUE—*when injunction suit "may affect real estate."* A proceeding to enjoin individuals from removing one wing of a court house to another part of the court house ground is a suit which "may affect real estate," within the meaning of section 3 of the Chancery act, and must be brought in the county where the court house is located.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JESSE HOLDOM, Judge, presiding.

On July 25, 1903, Frank M. Munger and M. J. Henaghan, the appellants, who are residents and tax-payers of DeKalb county, filed a bill in the superior court of Cook county for an injunction to restrain John V. Crowe and Albert J. Crowe, who are residents of Cook county, from removing the west wing of the court house at Sycamore, in DeKalb county, from its present site to another part of the court house grounds. A temporary injunction issued in accordance with the prayer of the bill. The defendants filed a sworn answer and a motion to dissolve the temporary injunction and to dismiss the bill for want of equity, and presented affidavits in support of said motion. The court, upon considering the pleadings and affidavits, entered a decree dissolving the injunction. Complainants prayed an appeal from that decree, and the court thereupon dismissed the bill for want of equity. Complainants appealed from the decree dissolving the injunction and dismissing the bill to the Appellate Court for the First District. That court affirmed the decree of the superior court on the ground that a decree in conformity with the prayer of the bill would affect real estate wholly in DeKalb county, and that the courts of Cook county therefore had no jurisdiction of the cause. Complainants in the bill prosecute a further appeal to this court.

The facts material to a decision of the questions here presented are as follows:

At an adjourned regular meeting of the board of supervisors of DeKalb county, held on June 11, 1903, a special building committee was appointed pursuant to a resolution of the board. On the following day a resolution was adopted by the board accepting and adopting plans and specifications prepared by H. T. Hazelton, an architect, for the erection of

a court house for DeKalb county, said plans to be subject to changes and approval of said special building committee, and Hazelton was directed to provide the balance of the specifications and details necessary to furnish and complete the court house and file a copy thereof with the county clerk by June 26, 1903. By the resolution the special building committee was authorized and directed to take steps to remove the west wing of the present court house, and vaults therein, to some convenient place on the court house grounds, for use during the construction of the new court house.

On June 26, 1903, the special building committee accepted the bid of \$1600 made by the appellees for the removal of the west wing and vaults, and on July 1, 1903, entered into a contract with appellees based upon such bid. Appellees entered upon the performance of the contract, but were restrained from completing it by the temporary injunction herein.

Appellants contend that a decree in accordance with the prayer of the bill would not affect real estate in DeKalb county, and that as the defendants were residents of Cook county, the suit was properly commenced in the latter county. They also urge that the contract under which appellees were working is void, and that appellees had no authority to proceed under that contract.

LLOYD C. WHITMAN, and HARRY W. McEWEN, (KERN & BROWN, of counsel,) for appellants.

HOPKINS, DOLPH, PEFFERS & HOPKINS, for appellees.

Mr. JUSTICE SCOTT delivered the opinion of the court:

The first question presented is, did the superior court of Cook county have jurisdiction of this suit? This must be determined by section 3 of chapter 22, Hurd's Revised Statutes of 1903, which reads as follows:

"Suits in chancery shall be commenced in the county where the defendants, or some one or more of them resides; or if the defendants are all non-residents, then in any county; or if the suit may affect real estate, in the county where the same or some part thereof is situated. Bills for injunctions to stay proceedings at law shall be brought in the county in which the proceedings at law are had."

It is contended by appellees that the superior court of Cook county did not have jurisdiction of the suit because it was a suit which may affect real estate in DeKalb county.

Appellants insist this suit would not affect real estate, and that the injunction operates upon the individuals only.

The court house of DeKalb county was a part of the realty on which it was located. Removing it, or a part of it, from its location necessarily affects the real estate on which it is located and of which it is a part. Restraining the removal of a building by one having or claiming the right to remove it, from one part of certain real estate to another part thereof, has a physical and material effect on the real estate.

"The meaning of the word 'affect,' as used in the statute, is to act upon, which indeed is its ordinary signification." *Enos v. Hunter*, 4 Gilm. 211.

If the court, to grant the relief sought, must deal directly with the real estate itself, then the suit is one "which may affect real estate." *Johnson v. Gibson*, 116 Ill. 294; *Hayes v. O'Brien*, 149 id. 403; *Craft v. Indiana, Decatur and Western Railway Co.* 166 id. 580.

The effect of this suit, if an injunction should be awarded, would primarily be upon the persons enjoined, but its practical and ultimate effect would be upon the real estate. If the injunction did not have that effect it would be useless. While it would restrain the persons from acting, it is clear that the resultant effect on the property was the end sought. If the object of the suit were to compel the removal of a building from the real estate it would scarcely be contended

that real estate would not be affected thereby, and it seems equally clear that where an injunction is sought to prevent the removal or physical disturbance of a part of the real estate the suit is one which "may affect real estate." By such an injunction the court would, so far as matter of substance is concerned, deal directly with the real estate itself.

As we are of the opinion that the superior court was without jurisdiction, for the reason that the suit could under the statute be properly brought only in DeKalb county, it is unnecessary to consider the other propositions which have been urged upon our attention.

The decree will be affirmed.

Decree affirmed.

LIZZIE MAGUIRE

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Opinion filed December 20, 1905.

1. TRIAL—*permitting leading questions will not reverse unless there is substantial injury.* Permitting leading questions to be asked will not work reversal unless the trial court has so abused its discretion in that regard that substantial injury has resulted.

2. CRIMINAL LAW—*what not essential to the crime of allowing minor girl to stay in house of prostitution.* The keeper of a house of prostitution who permits an unmarried female under the age of eighteen years to live, board, stop or room in the house is guilty of a crime, under the statute, regardless of whether such female practices prostitution or is wanting in virtue.

3. SAME—*prosecution is not bound to prove the knowledge by keeper of house of ill-fame that an inmate is a minor.* In a prosecution against the keeper of a house of prostitution for permitting an unmarried female under eighteen years of age to stay in the house, the People are not bound to prove knowledge, by the keeper, of the age of such inmate.

4. SAME—*when instruction as to credibility of defendant's testimony is not erroneous.* An instruction directing the jury that in determining the degree of credibility to be accorded to the defend-

ant's testimony they had a right to consider, among other things, the fact, if it was a fact, that she had been contradicted by other and credible witnesses, is not erroneous, as authorizing the jury to discredit her testimony if she had been contradicted by other credible witnesses.

WRIT OF ERROR to the Criminal Court of Cook county;
the Hon. R. S. TUTHILL, Judge, presiding.

BURRES & MCKINLEY, for plaintiff in error.

WILLIAM H. STEAD, Attorney General, and JOHN J. HEALY, State's Attorney, (ROBERT N. HOLT, of counsel,) for the People.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

Lizzie Maguire, plaintiff in error, was convicted in the criminal court of Cook county under an indictment charging her with being the keeper of a house of prostitution and assignation, and suffering and permitting Anna Liebke, an unmarried female under the age of eighteen years, to live, board, stop and room in said house.

The evidence established the guilt of the defendant. She and her husband occupied the second and third floors of a building, and her testimony was intended to prove that the business of prostitution and assignation was confined to the third floor and was under the sole charge of her husband. Her testimony, however, as well as all the evidence in the case, proved that she participated in the business, and in the absence of her husband had charge and control of it and received the proceeds.

It is assigned for error that the court permitted the State's attorney, over the objection of defendant, to ask leading questions on the examination of two girls who testified on the part of the prosecution. Many questions were asked which embodied the fact sought to be proved by the witness

and suggested the answer desired, and as a general rule such questions should not be permitted. There are conditions under which such questions are not improper, and the propriety of permitting them is a matter within the sound discretion of the court. The exercise of such discretion is subject to review, and where it appears that there has been an abuse of the discretion, resulting in substantial injury, it is ground for reversing a judgment; (*Coon v. People*, 99 Ill. 368;) but unless there has been a palpable abuse of discretion the allowance of leading questions will not alone be a sufficient reason for a reversal. (*Weber Wagon Co. v. Kehl*, 139 Ill. 644; *Funk v. Babbitt*, 156 id. 408.) In this case, although the court was quite indulgent with the State's attorney in ruling on the questions, we do not think there was a clear abuse of discretion.

The next complaint is, that the second instruction given at the request of the prosecution permitted the jury to find the defendant guilty irrespective of the question whether Anna Liebke practiced prostitution while living or stopping in defendant's house and regardless of knowledge on the part of defendant of the age or virtue or want of virtue of said girl. The statute makes it a crime for the keeper of a house of prostitution or assignation, where prostitution, fornication or concubinage is allowed or practiced, to suffer or permit any unmarried female under the age of eighteen years to live, board, stop or room in such house, building or premises. It is not an element of the crime that the female shall practice prostitution or shall be lacking in virtue, but it is unlawful to permit her to live, board, stop or room in a house of the character mentioned, for any purpose. The instruction contained every element of the crime as defined by the statute, and was not incorrect. The statute was designed for the protection of girls, and if defendant permitted one of the prohibited class to stay in her house of prostitution she did it at her peril. The prosecution was not bound to prove knowledge, on her part, of the age of Anna Liebke.

McCutcheon v. People, 69 Ill. 601; *Farmer v. People*, 77 id. 322.

It is urged that the eighth instruction given at the instance of the prosecution was fatally defective in authorizing the jury to discredit the defendant as a witness if she was contradicted by other credible witnesses. The instruction is the same, in substance, as the one given in the cases of *Hirschman v. People*, 101 Ill. 568, and *Rider v. People*, 110 id. 11, relating to the tests to be applied to a defendant charged with crime for the purpose of judging of his credibility, except that it omits the element of the demeanor and conduct of the defendant during the trial when not on the witness stand. It directed the jury that in determining the degree of credibility to be accorded to the defendant they had a right to take into consideration, among other things, the fact, if it was a fact, that she had been contradicted by other and credible witnesses. In the opinion by Mr. Justice SCHOLFIELD in *Hirschman v. People*, it was held that the instruction was proper, and did not assume that the defendant was contradicted or give undue prominence to an isolated fact, and in the opinion by Mr. Justice MULKEY in *Rider v. People*, it was held to be correct on the identical question now raised by counsel. The rules given for the purpose of weighing defendant's testimony were correct, and the jury were only authorized to disregard it entirely if she had willfully and corruptly testified falsely to some fact material to the issue.

There was an error in the form of the judgment, but the verdict was in proper form and the judgment has been corrected in the criminal court.

The judgment is affirmed.

Judgment affirmed.

HENRY H. GAGE*

v.

THE PEOPLE *ex rel.* John J. Hanberg, County Treasurer.

Opinion filed December 20, 1905.

1. SPECIAL ASSESSMENTS—*when omission of dollar-mark is fatal to judgment.* A judgment of sale for a special assessment is defective which refers to a schedule attached thereto for the amount, but there is no dollar-mark in front of the numerals in the schedule and nothing to show that the numerals indicate dollars and cents.

2. SAME—*judgment should state that the necessary notice was given.* Where notice to the adverse parties of the re-docketing of a cause is necessary, the judgment should specifically show, by proper recitals, that such notice was given to them.

3. SAME—*judgment of sale signed with initials is not sufficient.* A judgment and order of sale marked "O. K.," with the initials of the county judge following, does not conform to the statute providing that it shall be signed by the county judge.

WRIT OF ERROR to the County Court of Cook county; the Hon. ORRIN N. CARTER, Judge, presiding.

At the June term, 1903, of the county court of Cook county, the county collector applied for judgment against the property of plaintiff in error for the first and second installments of a special assessment levied for paving Turner avenue, in the city of Chicago. The court overruled the objections of plaintiff in error and judgment and order of sale was entered, which was reversed by this court upon appeal. (*Gage v. People*, 207 Ill. 61.) Subsequently a transcript of the order reversing and remanding the cause was filed in the county court, and an order entered setting the case for hearing on Thursday, March 24, 1904, at ten o'clock A. M. At the time set for the hearing an order was entered which recited as follows: "It appearing to the court that the mandate and transcript of the order of the Supreme Court of Illinois reversing the judgment of this court heretofore entered here-

*Consolidated case, being Nos. 4218, 4219 and 4220.

in as to the property of the objector, represented by F. W. Becker, attorney, and remanding said cause as to the property of said objector, has been filed herein for more than ten days last past, and that due notice has been given that a motion would be made by said petitioner to re-docket the cause, and for further proceedings in conformity with the opinion of the Supreme Court, therefore the said cause," etc. Following the judgment was an order of sale against the lots for the amounts as indicated in the schedule attached to the order. The plaintiff in error did not appear in the court below subsequent to the reversal of the cause, and from the order as entered he has prosecuted a writ of error, claiming that the cause was re-docketed without statutory notice; that the re-docketing order is defective; that the court was without jurisdiction to enter the order, and that there are defects in the form of the judgment and order of sale.

F. W. BECKER, for plaintiff in error.

ROBERT REDFIELD, and FRANK JOHNSTON, Jr., (EDGAR B. TOLMAN, Corporation Counsel, of counsel,) for defendant in error.

Mr. JUSTICE WILKIN delivered the opinion of the court:

The body of the judgment and order of sale refers to a schedule attached thereto, which is supposed to indicate the amount due upon each lot. It is insisted that this schedule is fatally defective, for the reason that there is no word, mark or character to show what the numerals appearing in the various columns stand for. In the cases of *Gage v. People*, 213 Ill. 347 and 410, we reversed the judgments of the county court for the reason that the dollar-mark was omitted from in front of the numerals, and there was nothing to show what the figures indicated. The judgment at bar is identical with those in the cases referred to. The dollar-mark is entirely omitted, and the judgment will have to be reversed for this omission.

Complaint is also made that the recital in the judgment does not sufficiently show that proper notice was given before the case was re-docketed. It is insisted that to sustain an order of re-docketing the record ought affirmatively to show that due notice of the filing of the transcript of the remanding order was given to the adverse party or his attorney, and that notice should appear in the files, or the order re-docketing the case should recite that due notice was given to the respective parties. The remanding order of this court directs the county court to enter judgment in conformity with section 191 of the Revenue act.

It is contended that inasmuch as the court below could do no more than enter the judgment as directed, notice would serve no purpose and was unnecessary. The statute seems to contemplate notice of re-instatement or remandment in all cases. But it is said the recitals in the judgment show notice. The recital did not specifically state that notice had been given to the parties interested, and was not sufficient.

It is also insisted that the judgment and order of sale does not comply with the requirements of the statute, for the reason that it is not signed by the county judge. The letters "O. K.—O. N. C.," appear at the end of the order. The statute expressly provides that the judgment and order of sale shall be signed by the county judge. (Hurd's Stat. 1903, chap. 120, sec. 191, p. 1541.) While we will take judicial notice of the name of the present occupant of the office of county judge of Cook county, yet the initials at the end of the order do not comply with the requirement of the statute.

For the errors indicated the judgment of the county court will be reversed and the cause remanded, with leave to the attorneys for defendant in error to move the court for, and with directions to the county court to enter, a judgment in conformity with section 191 of the Revenue act.

Reversed and remanded, with directions.

JOSHUA TEDFORD

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Opinion filed December 20, 1905.

1. **INDICTMENT**—*when an indictment is sufficiently plain to be understood.* An indictment charging, in substance, that the defendants have conspired and agreed together to do an illegal act injurious to the administration of public justice, by soliciting, persuading, enticing and inducing certain persons to leave the State or secrete themselves so that they could not be produced as witnesses at the trial of a certain person then under indictment for burglary in the criminal court of Cook county is sufficiently plain to be understood by the defendants and the jury, which is all the law requires.

2. **SAME**—word "State," as used in section 272 of the Criminal Code, is synonymous with "jurisdiction." An indictment charging that the defendants induced witnesses in a criminal case to absent, keep and secrete themselves out and away from the jurisdiction of the criminal court and to leave and depart from said jurisdiction is a sufficient averment that they were induced to leave the State, since the word "jurisdiction," as so used, is synonymous with the word "State" as used in section 272 of the Criminal Code.

3. **SAME**—*fact that testimony of witnesses induced to leave the State is material need not be alleged.* Parties conspiring together to induce persons who they know are witnesses in a criminal case to leave the jurisdiction of the court so that they cannot be produced as witnesses are guilty under the statute, whether the testimony of such witnesses would be material and result in conviction or acquittal of the accused or not, and the indictment need not aver that the testimony of the witnesses was material.

4. **CONSPIRACY**—*conspiracy may be proved by circumstantial evidence.* A conspiracy may be proved by direct evidence or established by proof of circumstances from which a jury may infer its existence.

5. **SAME**—*what evidence is not competent as a defense to conspiracy.* In a prosecution for conspiracy to induce witnesses in a criminal case to leave the State, the guilt or innocence of the person at whose trial the witnesses should have testified is not material, and proof that he was guilty of the offense is properly denied admission.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on writ of error to the Criminal Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding.

S. H. TRUDE, and JAMES T. BRADY, for plaintiffs in error.

WILLIAM H. STEAD, Attorney General, JOHN J. HEALY, State's Attorney, and HARRY OLSEN, for the People.

Mr. JUSTICE HAND delivered the opinion of the court:

The grand jury of Cook county, at the April term, 1903, returned into the criminal court of said county an indictment charging Joshua Tedford, David Dudenhaver, Frank Cantwell and William Davis with having conspired together to do an illegal act injurious to the administration of public justice, by persuading and inducing Frank Cantwell and Myrtle Lewis to secrete themselves and to depart the State so that they could not be produced as witnesses on behalf of the People upon the trial of William Hickey, who was under indictment in the criminal court of Cook county for the crime of burglary. The defendants filed a plea of not guilty, (after a motion to quash the indictment had been overruled,) and a trial was had which resulted in the conviction of all the defendants. William Davis was granted a new trial, Cantwell was fined \$100 and Tedford and Dudenhaver were sentenced to the penitentiary. The judgment was affirmed by the Appellate Court for the First District, and Tedford and Cantwell have sued out a writ of error from this court, but Tedford alone has filed a brief.

The first contention made is, that the trial court erred in overruling the motion to quash the indictment. The indictment, omitting the formal part, is as follows: "That on the 24th day of July, in the year of our Lord 1902, the grand jury of said county duly returned, empaneled and

sworn as such grand jury at and for the July term of said criminal court of said Cook county, in the year of our Lord 1902, returned a certain indictment, in due form of law, against one William Hickey into said criminal court of Cook county, charging the said William Hickey therein with a certain criminal offense, to-wit, burglary; that said indictment so returned against the said William Hickey by said grand jury, aforesaid, was pending in said criminal court of Cook county from said 24th day of July, in the year of our Lord 1902, up to and including the 14th of October, in the year of our Lord 1902; that one David Dudenhaver, one Joshua Tedford, one Frank Cantwell and one William Davis, late of the county of Cook, on said 14th day of October, in the year of our Lord 1902, in said county of Cook, in the State of Illinois aforesaid, not being ignorant of the pendency of said indictment, as aforesaid, but then and there well knowing the said premises, as aforesaid, and then and there contriving and intending the due course of justice to obstruct and impede, did then and there, on the said 14th day of October, in said county of Cook, in the State of Illinois aforesaid, unlawfully, feloniously, fraudulently, maliciously, wrongfully and wickedly conspire and agree together with the fraudulent and malicious intent then and there wrongfully and wickedly to do a certain illegal act then and there injurious to the administration of public justice, to-wit, to then and there solicit, entice, persuade and induce the said Frank Cantwell and one Myrtle Lewis to absent, keep and secrete themselves, the said Frank Cantwell and said Myrtle Lewis, out of and away from the jurisdiction of said criminal court of said Cook county, and to leave and depart from said jurisdiction of said criminal court of said Cook county and from said Cook county, and not to appear as witnesses upon the trial of said indictment so pending against the said William Hickey, as aforesaid, when the same should come on for trial in said criminal court of said Cook county; that the said Frank Cantwell and said Myrtle Lewis were then

and there witnesses for and in behalf of the said People of the State of Illinois and against said William Hickey in said indictment against him so pending in said criminal court, as aforesaid, and that the said Frank Cantwell and said Myrtle Lewis were then and there within said county of Cook; that the testimony of said Frank Cantwell and said Myrtle Lewis was material then and there in said cause of action against said William Hickey upon the trial of said indictment so pending, as aforesaid, when the same should be tried in said criminal court, as the said David Dudenhaver, said Joshua Tedford, said Frank Cantwell and said William Davis then well knew, contrary to the statute and against the peace and dignity of the same People of the State of Illinois."

It is first urged the indictment is insufficient, as it is said it does not follow the language of section 46 of the Criminal Code, and that the facts averred are insufficient, in law, to show a crime has been committed. Section 46 of the Criminal Code provides: "If any two or more persons conspire or agree together * * * to do any illegal act injurious to the * * * administration of public justice, * * * they shall be deemed guilty of a conspiracy." And section 272, that "whoever, by hiring, persuasion, or otherwise, induces any witness in any criminal cause * * * to leave the State or secrete himself so that he cannot be produced as a witness at any * * * trial of the person so * * * charged, * * * shall be fined," etc. And section 408, that "every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct which states the offense in the terms and language of the statutes creating the offense, or so plainly that the nature of the offense may be easily understood by the jury." While the offense is not charged in the exact language of the statute creating the offense, it is substantially so charged, and we think the charge that the defendants had conspired and agreed together to do an illegal act injurious to the administration of public justice, by soliciting, persuading, entic-

ing and inducing Frank Cantwell and Myrtle Lewis to leave the State or secrete themselves so that they could not be produced as witnesses at the trial of William Hickey, who was then under indictment in the criminal court of Cook county upon a charge of burglary, is so plain that the nature of the offense with which the defendants were charged could easily be understood by the jury and by defendants, and that is all that the law requires. *Glover v. People*, 204 Ill. 170.

It is next urged that the indictment does not charge that the witnesses were induced to leave the State, and for that reason it is insufficient. The indictment charges the witnesses were induced to absent, keep and secrete themselves out of and away from the jurisdiction of the criminal court, and to leave and depart from said jurisdiction and not to appear as witnesses. This was sufficient. The word "jurisdiction," as here used, is synonymous with the word "State," as used in section 272 of the Criminal Code.

It is further urged that there is no averment in the indictment that the witnesses Cantwell and Lewis had any knowledge which, had they been called as witnesses, would have shown the guilt of Hickey, or that said witnesses were known to the State, or that said witnesses were before the grand jury, or that their names were endorsed upon the indictment. The indictment avers that an indictment was pending in the criminal court against Hickey for burglary; that Cantwell and Lewis were witnesses on behalf of the People; that the defendants knew those facts, and that they conspired together to induce Cantwell and Lewis to secrete themselves and to depart from the jurisdiction of the court so that they could not be produced as witnesses against said Hickey upon the trial of said charge. If defendants knew that Cantwell and Lewis were witnesses against Hickey and they conspired together to persuade and induce them to secrete themselves or to depart the State so that they could not be produced as witnesses on the trial of Hickey, they clearly violated the statute, and they cannot excuse themselves upon

the ground that the evidence of the witnesses was not important or would not have tended to show Hickey guilty. The materiality of the evidence of the witnesses was not a question for defendants to determine, and that averment in the indictment was properly disregarded as surplusage. The obstructing of the due course of the administration of public justice means not only the prevention of the conviction or acquittal of an accused, but also means the interference with the due course of proceedings in the administration of public justice. (*Commonwealth v. Reynolds*, 14 Gray, 87; *State v. Holt*, 84 Me. 510; *People v. Keys*, 8 Vt. 66.) While the indictment charges the defendant Frank Cantwell with having conspired with the other defendants to induce himself to secrete himself or to depart from the State, it also charges that he conspired with the other defendants to induce Myrtle Lewis to secrete herself and to depart from the jurisdiction of the court. We are of the opinion the indictment was sufficient and that the court properly overruled the motion to quash.

The next contention is that the evidence is not sufficient to support the verdict. On the evening of the 4th of July, 1902, Thomas Jones made complaint to the police that the flat in which he lived, in the city of Chicago, had been forcibly entered and a trunk kept therein broken open and \$1200 in cash taken therefrom. On the 24th day of the same month an indictment was returned by the grand jury charging William Hickey with burglarizing the said flat. Hickey was in Chicago on the evening of the 4th of July and had been there for some weeks, but during that night or the succeeding day he left the city and returned to New York, where his family resided and where he claimed his home. In the latter part of the following September, Tedford, who was on the police force of the city of Chicago, went to New York for the purpose of returning Hickey to Illinois as a fugitive from justice, by reason of certain extradition proceedings which had been instituted for that

purpose. Hickey was arrested in New York City but declined to return to Chicago voluntarily, and sued out in that city a writ of *habeas corpus* for his discharge. Upon a hearing he was remanded to the custody of Tedford and was returned to Chicago and confined in the Cook county jail. On the 5th of October his mother, Mrs. Jane Hickey, arrived in Chicago with a view to render to her son such assistance as she could. Prior to Tedford leaving New York City with her son she asked him when he would leave the city. He informed her he did not know. She said to him she wanted to wire a lawyer in Chicago to meet her son on his arrival and look after his case. Tedford inquired whom she proposed to wire, and she gave him the lawyer's name. Tedford said to her the lawyer named was not a criminal lawyer and for her to leave the getting of a lawyer for her son to him. On her arrival in Chicago she employed an attorney to represent her son and soon met Tedford and Dudenhaver, and within a short time her son was admitted to bail. Tedford objected to the employment of the lawyer whom she had retained and suggested to her the employment of Dudenhaver, and she and her son agreed to discharge the lawyer they had retained and to retain Dudenhaver. Frequent meetings took place between Tedford, Dudenhaver and Mrs. Hickey and her son during the next few days in Chicago. They met at the court house and on Twenty-second street, near Michigan avenue, and Mrs. Hickey and her son were at Dudenhaver's office and Dudenhaver was at the place where they stayed, on Illinois street. It was suggested by Tedford and Dudenhaver to the Hickeys that the case could be settled out of court. Tedford named \$900 as the amount it would require to settle the case out of court. He and Dudenhaver explained to the Hickeys that the material witnesses against William Hickey were Frank Cantwell and Myrtle Lewis, it being claimed by Tedford that Myrtle Lewis lived in the same building with Thomas Jones and wife, and that she would testify she saw Hickey enter their flat, and that by the pay-

ment of money the witnesses Cantwell and Lewis could be kept away from court, and that the case could be passed and finally dropped. Tedford stated to the Hickeys that Cantwell would leave the State and take Myrtle Lewis with him if he was paid \$200. Mrs. Hickey at the second meeting with Tedford and Dudenhaver on Twenty-second street, near Michigan avenue, agreed to pay to Tedford \$900. When the case against Hickey was called for trial on about the 14th of October, 1902, in the criminal court, Tedford and Dudenhaver were present in court. Tedford then stated to the assistant State's attorney and the presiding judge that he could not get two of the witnesses, and the case was passed until the next morning. On the next morning when the case was called the witnesses were not present, and Tedford then stated Myrtle Lewis was in the State of California. The case was again passed, and Tedford and Dudenhaver, as they left the court room, were arrested. The Hickeys, during their negotiations with Tedford and Dudenhaver, informed their attorney, and also the State's attorney, of the proposition of Tedford to settle the case out of court for the sum of \$900, and that the witnesses Cantwell and Lewis were to be induced to depart from the State so that they could not be produced in court to testify against Hickey on the trial. The defendants Tedford, Cantwell and Davis were sworn as witnesses in their own behalf and denied all facts which tended to incriminate them and called numerous witnesses to prove their general good character. Dudenhaver did not testify. Davis was a police officer, and while he and Cantwell were present at some of the meetings of the parties they appear to have had but little to say.

A conspiracy may be proved by direct evidence or it may be established by the proof of facts from which a jury may infer its existence,—that is, by circumstantial evidence. (*Ochs v. People*, 124 Ill. 399.) The evidence on behalf of the People, found in this record, if true, establishes that Tedford and Dudenhaver agreed with Mrs. Hickey and her

son to induce the witnesses Cantwell and Lewis to leave the State of Illinois so that they could not be produced upon the trial of Hickey. Their object in keeping said witnesses away from the criminal court was that the prosecution of Hickey should fail for the want of proof, and the motive which prompted them was to obtain money from Mrs. Hickey. While the evidence was conflicting, the jury saw and heard the witnesses and were in a better position than we to determine which of the witnesses they should believe and what credit to give to the testimony of the defendants, and there being nothing so inherently improbable in the testimony of the witnesses for the People as to justify this court in disregarding their testimony as unworthy of belief, we are unable to say the verdict of the jury and the judgment of the court should be set aside for want of evidence.

The defense on the trial sought to show that William Hickey was guilty of burglarizing the Jones flat, that is,—the defense sought to try Hickey in this case. This the court declined to permit them to do. In this we think the court did not err, as Hickey was not upon trial, and the defendants could not justify their conduct in causing the witnesses in that case to leave the State, as for the purposes of their trial it was wholly immaterial whether Hickey was guilty or innocent.

The further contention is made that the jury were misdirected as to the law and that the court improperly refused certain instructions offered on behalf of defendants. The instructions presented on behalf of the People, as well as those upon behalf of the defendants, were very numerous. Forty-one instructions were given on behalf of the People and thirty on behalf of the defendants, and seventy-two offered upon behalf of the defendants were refused. We have examined the instructions given on behalf of the People and those given on behalf of the defendants, as well as those refused which were offered on behalf of the defendants, and are of the opinion the jury were properly instructed as to

the law of the case. The questions raised upon the giving and refusing of instructions are so numerous that we can not consider each of these questions separately, and it would serve no useful purpose to do so. The court did not commit reversible error in giving or refusing instructions.

Finding no reversible error in this record, the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

CHARLES VANDORN

v.

HENRY ANDERSON.

Opinion filed December 20, 1905.

1. MANDAMUS—*when mandamus will issue to compel performance of an official act.* Mandamus will issue to compel the performance of an official act in a proper manner when such act is in its nature ministerial and not judicial.

2. SAME—*mandamus will issue to compel county superintendent of schools to date certificate correctly.* A county superintendent of schools, on issuing a teacher's certificate, has no power to date it back of the time it was actually issued, and he may be compelled by mandamus to date it correctly.

3. SCHOOLS—*date of teacher's certificate is a material matter.* A teacher's certificate issued by the county superintendent should be dated as of the time it is issued, the date being a material matter, in that it shows the beginning of the period the teacher is entitled to teach thereunder.

4. SAME—*county superintendent cannot deny recitals of certificate issued by him.* A county superintendent is estopped to deny the recitals of a teacher's certificate issued by him, and he cannot, in an action of mandamus to compel him to date the certificate correctly, collaterally attack the certificate by attempting to show that it was issued without due examination.

5. SAME—*teacher's certificate cannot be renewed except as provided in the statute.* A teacher's certificate cannot be renewed except by the endorsement of the county superintendent as provided in the statute, and the issuance of a new certificate cannot be regarded as a renewal.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Sangamon county; the Hon. J. A. CREIGHTON, Judge, presiding.

This is a petition, filed by the appellee in the circuit court of Sangamon county, against the appellant as superintendent of schools of said Sangamon county, praying for a writ of *mandamus*, commanding appellant to change the date of a teacher's certificate issued by appellant to appellee, so that said certificate should show upon its face the true date of its issuance. After a demurrer to the petition was filed and overruled, appellant pleaded to the same, and, upon the hearing, the trial court found the issues for appellee, the petitioner, and ordered that the writ issue forthwith, commanding appellant that he correct the certificate, which bore date on July 1, 1901, so that it would show upon its face the true date of its issuance by appellant to appellee, to-wit, the first day of September, 1902. An appeal was taken from the judgment, ordering the issuance of the writ, to the Appellate Court, which has affirmed said judgment. The present appeal is prosecuted from such judgment of affirmance.

The petition averred that appellee, of Sangamon county, had for many years prior to July 2, 1902, taught in the common schools of said county, under several first-grade certificates issued to him by the superintendent of schools of that county upon due examination; that the last of said first-grade certificates expired on July 2, 1902, and that afterwards, on September 1, 1902, appellee applied to appellant, as such superintendent, to grant to him a first-grade certificate, and was there and then ready and willing to submit himself to an examination by appellant, as such superintendent, touching his qualifications; that thereupon the appellant on, to-wit, September 1, 1902, issued and delivered to appellee a certificate in the words and figures following, to-wit:

"SANGAMON COUNTY, ILLINOIS, July 2d, 1901.

"The undersigned having examined Henry Anderson in (certain studies, naming them,) and being satisfied that he is of good moral character, hereby certifies that his qualifications in all the above branches are such as to entitle him to this certificate, being of the first grade, valid in said county for two years from the date hereof, and renewable at the option of the county superintendent by his endorsement thereon.

"Given under my hand and seal at the date aforesaid.

CHARLES VANDORN, (Seal.)

County Superintendent of Schools."

The petition then avers that, when the certificate was delivered to him, he did not observe that it did not bear the true date of its issuance, (being dated July 2, 1901, instead of July 2, 1902), but that, when appellee did observe that date written in said certificate, he afterwards, to-wit, on August 24, 1903, applied to appellant as such superintendent at his office in Springfield, in said county, to correct the date of the certificate, so that the same would show the true date of its issuance, but that appellant refused to make such correction, by means whereof appellee was prevented from teaching in said county from September 1, 1903, until September 1, 1904, as he had a just and lawful right to do.

PERRY & MORGAN, for appellant.

SHUTT & GRAHAM, and HAMILTON & CATRON, for appellee.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

The appellant, as county superintendent of schools of Sangamon county, first issued to appellee a first-grade certificate in 1899, upon a written examination as to his qualifications. When this certificate expired two years later, to-wit, on July 1, 1901, appellant at that time issued another first-grade certificate to appellee, but dated it back to July 2, 1900. The latter certificate was issued without a further written examination, as appellee had taken an examination

in 1899, and he testifies that appellant told him that another one was not necessary, and that when a teacher had passed one examination, appellant would not require him to take another during his superintendency. As the second certificate, issued on July 1, 1901, had been dated back a year to July 2, 1900, it therefore expired, according to its date, on July 1, 1902. Appellee applied to appellant in June, 1902, to correct the date on said certificate so that it would bear the true date of its issuance, namely, July 2, 1901; but appellant refused to correct the date as requested, and, thereupon, appellee on September 1, 1902, made a written application to appellant as such superintendent, in the usual form, for a new certificate, and left one dollar to pay for the same. Thereupon, without further written examination, appellant issued and delivered to appellee a new first-grade certificate, but dated the same back to July 2, 1901, as will appear from the certificate set forth in the statement preceding this opinion. When appellee discovered, in April, 1903, that this certificate had been dated back, he went to appellant in August of that year and asked him to correct the date of the certificate, so that it would bear date as of September 1, 1902, the true date of its issuance, but appellant refused so to do; and thereupon the present petition for *mandamus* was filed. Section 3 of article 7 of the School law provides that "it shall be the duty of the county superintendent to grant certificates to such persons as may, upon due examination, be found qualified. Said certificates shall be of two grades; those of the first grade shall be valid in the county for two years, and shall certify that the person, to whom such certificate is given, is of good moral character, and is qualified to teach [certain studies, naming them]. * * * Certificates of the second grade shall be valid for one year, and shall certify that the person, to whom such certificate is given, is of good moral character, and is qualified to teach [mentioning certain studies]. * * * The county superintendent may in his option renew said certificates at their expiration

by his endorsement thereon," etc. (Hurd's Rev. Stat. of 1899, p. 1552.) Section 3 of article 7 above referred to prescribes the form of the certificate; and such form contains the words: "valid in said county for . . . year . . . from the date hereof, renewable at the option of the county superintendent by his endorsement thereon."

Paragraph 16 of section 13 of article 2 of said School act also provides that "it shall be the duty of each county superintendent of schools in this State * * * to grant certificates of qualification to such persons as may be qualified to receive them, as provided for in section 3 of article 7 of this act," etc. (Hurd's Rev. Stat. of 1899, p. 1523). Paragraph 3 of section 14 of article 2 of said act also provides that "the said county superintendent shall have power * * * to renew teachers' certificates at their expiration by his endorsement thereon." (Ibid.)

It is insisted by appellant that the performance of the duties, imposed upon the county superintendent of schools by the provisions of the statute above quoted, is a matter of discretion and judgment with that official, and that, therefore, their performance cannot be enforced by *mandamus*. Undoubtedly, it is the general rule that the writ of *mandamus* will not lie to compel the performance of acts or duties, which necessarily call for the exercise of judgment and discretion on the part of the officer or body, at whose hands their performance is required. (*People ex rel. v. Illinois State Board of Dental Examiners*, 110 Ill. 180; *Illinois State Board of Dental Examiners v. People*, 123 id. 227). But a writ of *mandamus* will issue to command the performance of an official act in a proper manner when such act is in its nature ministerial, and not judicial. (*Graham v. People*, 111 Ill. 253; *People v. Mayor of Alton*, 179 id. 615.)

Under the provisions in question the county superintendent undoubtedly exercises a discretion, judicial in its character, when he determines that the teacher, applying for the certificate, has the qualifications required by the statute.

A *mandamus* will not issue, requiring the county superintendent to give a certificate that the applicant possesses the necessary qualifications, because such act would be an attempt to control his judicial judgment. But after the county superintendent has decided that the teacher possesses the necessary qualifications, the issuing of the certificate, and the proper dating of the certificate, are merely ministerial acts, which he can be required to perform by the writ of *mandamus*. The prayer of the petition in the case at bar is, not that the appellant as county superintendent of schools shall issue a certificate to the appellee certifying that he possesses the necessary qualifications to teach, but the prayer is merely that he correct the date of a certificate, which he had already issued. This he can be compelled by the writ of *mandamus* to do, as he is thus required to perform merely a ministerial act.

It is not denied that appellant issued to the appellee a certificate, dated July 2, 1900, which was a first-grade certificate, and certified that appellee possessed the necessary statutory qualifications to teach. That certificate was valid for two years, under section 3 of article 7, as above quoted. The two years expired in July or September, 1902. It is not denied that, in the summer or fall of 1902, the appellee applied to the appellant for a new certificate, and that such certificate was issued to him. Appellant, however, instead of dating the certificate in September of 1902, when it was issued, dated it back to July 2, 1901. The statute provides that the first-grade certificates shall be valid for two years; it entitles the teacher to teach in a common school for two years. The period of two years begins with the date of the certificate; this is apparent from the fact that the form of the certificate, given by the statute, provides that it shall be valid for the requisite period "from the date hereof." The date of the certificate, therefore, is a material item, as showing the beginning of the period, for which the teacher is entitled to exercise his profession in the county. It makes

no difference what the motive or object of the appellant was in dating the certificate back for one year; the statute does not authorize any such action on his part, but evidently contemplates that the certificate should be dated as of the date of its issuance. Here, it was issued in September, 1902, but was dated back to the month of July, 1901. We are of the opinion that the court had the power by writ of *mandamus* to compel the appellant, as such superintendent, to correct the date of the certificate by changing it from 1901 to 1902. It made a difference of one year to the appellee, because, as the certificate was valid for only two years, if it was properly dated, in 1901, appellee's right to teach under it would expire in 1903, whereas if it was properly dated in 1902, his right to teach would not expire until September, 1904.

The certificate recites upon its face, that it is of the first grade, and also recites that the appellee possesses the necessary qualifications to entitle him to a certificate of the first grade. The appellant is estopped from denying these recitals in the certificate, issued by him to appellee. In *Union School District v. Sterricker*, 86 Ill. 595, it was held that a school certificate of this kind "is in the nature of a commission, and cannot be attacked collaterally." In that case it was held that such a certificate cannot be invalidated by proof, that no personal examination of the teacher was had, or that he did not possess the qualifications mentioned in the certificate. Appellant cannot now be allowed in this collateral attack to contradict and invalidate his own certificate by setting up, as appears to be done here, that the certificate was issued without due examination.

It appears from the proof that in 1899 the appellee did submit to a written examination touching his qualifications, and it also appears that the appellant, after such written examination, did not thereafter require an additional examination. It cannot be said that the certificate, issued in September, 1902, and dated back as of July, 1901, was a mere renewal of a former certificate. The certificate could only

be renewed in the manner pointed out in the statute. Section 3 of article 7, as above quoted, provides that "the county superintendent may, in his option, renew said certificates at their expiration by his endorsement thereon." The mode, provided by the statute for the renewal of the certificate, is by endorsement thereon, and, in the case at bar, there was no such endorsement renewing appellee's certificate, but a new certificate was issued to him, reciting that it was of the first grade, and that appellee possessed the necessary qualifications to teach.

We concur in what is said upon this subject by the Appellate Court in their opinion deciding this case, where the following views are expressed, to-wit: "It is not controverted that appellee made application for the certificate on September 1, 1902; that the same was granted, and, as a matter of fact, issued upon that day, and that it was dated back to July 1, 1901. The action of appellant in thus antedating the certificate was without legal justification and unwarranted, no matter what his motive may have been. The certificate in question being the only evidence the appellee possessed or could obtain as to his right to teach, he was entitled to have it show such authority for the full term, provided by the statute for a first-grade certificate. By the arbitrary, unauthorized and illegal act of appellant, appellee was deprived of such evidence, and thereby rendered unable to exercise his profession in Sangamon county for a longer period than nine months from the day upon which he was declared to be qualified to teach. He thereby lost a valuable property right, to regain which the remedy by *mandamus* was properly invoked. The propositions of law, submitted by appellant, were in direct conflict with the law governing the questions involved, and hence were properly refused."

We are of the opinion that the judgments of the lower courts are correct, and, accordingly, the judgment of the Appellate Court, affirming that of the circuit court, is affirmed.

Judgment affirmed.

PETER B. OLSEN, County Clerk,

v.

THE PEOPLE *ex rel.* Henry Buenger *et al.*

Opinion filed December 20, 1905.

1. MARRIAGE AND DIVORCE—*act of 1905, prohibiting re-marriage within one year, is valid.* The act of 1905, (Laws of 1905, p. 194,) prohibiting a person divorced from husband or wife for cruelty or desertion from re-marriage within one year, is not invalid as being an amendment not within the title of the act it purports to amend, in that it relates to marriage instead of divorce.

2. SAME—*acts of 1905 do not infringe constitutional rights.* The acts of 1905, amending the Divorce act by prohibiting a person divorced from husband or wife for cruelty or desertion from re-marrying within one year, and the Marriage act by imposing a penalty on a county clerk who knowingly issues a license to persons legally incapable of contracting a marriage, do not infringe any constitutional rights.

3. SAME—*acts of 1905 apply to persons divorced before act took effect.* The right of a divorced person to marry does not depend upon the decree of divorce but upon the existing marriage laws, and hence the act of 1905 which prohibits the re-marriage of divorced persons for a certain period applies to all persons coming within its terms, even though they were divorced before the act took effect.

4. SAME—*duty of the county clerk where application is made for a marriage license.* Under section 13 of the Marriage act, as amended in 1905, (Laws of 1905, p. 319,) imposing a penalty on a county clerk who knowingly issues a marriage license to persons legally incapable of contracting a marriage, it is the duty of the county clerk to inquire whether the persons applying for a license are incompetent to marry under the provisions of the Divorce act.

APPEAL from the Circuit Court of Cook county; the Hon. JULIAN W. MACK, Judge, presiding.

HARRY A. LEWIS, WILLIAM F. STRUCKMANN, and FRANK L. SHEPARD, for appellant:

Marriage is a status, and to enter into or continue in the same is not a vested right. The act of May 13, 1905, is not void as retrospective or *ex post facto*. The act applies to all

divorces within the proscribed period, even if granted prior to July 1, 1905. Bishop on Marriage, Divorce and Separation, (ed. of 1891,) secs. 1432, 1434, 1441, 1487, 1492, 1478-1480, 1483; Bishop on Marriage and Divorce, (6th ed.) secs. 304, 306a, 700; 1 Bishop on Stat. Crimes, sec. 138; 1 Bishop on Crim. Law, secs. 238, 239; *Elliott v. Elliott*, 38 Md. 357; *Owen v. Brackett*, 75 Tenn. 448; *Pennegar v. State*, 87 id. 244; *Brook v. Brook*, 9 H. of L. Cas. 219; *Strader v. Graham*, 10 How. 82; *Grogin v. Grogin*, 152 Mass. 533; *Cassidy v. Clark*, 62 Ga. 407; *Cox v. Combs*, 47 Ky. 231; *White v. White*, 105 Mass. 325.

ELMER E. LEDBETTER, for appellees:

As to what is an *ex post facto* law, see Bishop on Const. Lim. (4th ed.) 324; *Johnson v. People*, 173 Ill. 131.

If construed as a limitation upon marriage, simply, the act of May 13, 1905, is unconstitutional. Const. of 1870, art. 4, sec. 11; *People v. Nelson*, 133 Ill. 576.

The intent of the legislature must govern the literal interpretation of a statute. Endlich on Int. of Stat. sec. 295; *Soby v. People*, 134 Ill. 71; *Baird v. Hutchinson*, 179 id. 439; *Hogan v. Akin*, 181 id. 452; *Reinicke v. People*, 15 Ill. App. 244.

That the legislature did not intend the act in question to apply to parties divorced prior to the time at which it went into force is evidenced by the evil the act was designed to remedy, (*Soby v. People*, 134 Ill. 66; *People v. Kipley*, 171 id. 82; *Bobel v. People*, 173 id. 25; *Hogan v. Akin*, 181 id. 452; *People v. Harrison*, 191 id. 266;) and by the fact that the law in question is an amendment of the Divorce act. *Hogan v. Akin*, 181 Ill. 453.

This act is purely prospective, because it did not go into effect for some time after its enactment. Wade on Retroactive Laws, sec. 33.

A literal reading of a statute is frequently departed from. *Reinicke v. People*, 15 Ill. App. 245; *Railroad Co. v. Bin-*

kert, 106 Ill. 306; *Canal Comrs. v. Sanitary District*, 184 id. 604.

Past tense may be construed to mean future. *Melford v. Learned*, 16 Mass. 215.

Mr. JUSTICE BOGGS delivered the opinion of the court:

On the 21st day of August, 1905, the relator appellees, Henry Buenger and Eliza Grimes, applied to the appellant, the county clerk of the county of Cook, for a license to be joined in marriage. Eliza Grimes had been lawfully married to one Herman Mischler, and on the 28th day of June, 1905, a decree was entered in the circuit court of Cook county dissolving such marriage relation at the application of said Eliza, on the ground that her said husband had been guilty of extreme and repeated cruelty to her and had deserted and abandoned her. The county clerk refused to issue the marriage license, for the reason that the act of the General Assembly approved May 15, 1905, in force July 1, 1905, (Laws of 1905, p. 194,) declared that a person who had been formerly married and had been granted a divorce on the ground that his or her spouse had been guilty of extreme and repeated cruelty or desertion and abandonment should not marry again within one year from the time the decree for divorce was granted, and because sections 6 and 13 of the act "to revise the law in relation to marriages," approved February 27, 1874, (Rev. Stat. chap. 89,) as amended by the act of the legislature approved May 13, 1905, in force July 1, 1905, (Laws of 1905, p. 317,) prohibited the county clerk, under penalties and punishments therein specified, from issuing a license for the marriage of a person who was legally incapable of contracting a marriage. The relators thereupon filed their petition in the circuit court of Cook county for a writ of *mandamus* commanding the said county clerk to issue such marriage license to them. A demurrer was interposed and overruled, and the appellant

having elected to abide his demurrer the prayer of the petition was granted and judgment entered awarding the writ. The record is before us for review.

It is conceded that, in terms, the legislation of 1905 declared a person incapable of contracting marriage within one year after such person had been divorced, by decree of a court, from a former husband or wife on the ground of extreme and repeated cruelty or desertion and abandonment, for the statutory period. Appellees, however, contend that the decree divorcing the relator Eliza from her former husband was entered June 28 and prior to the time when such legislation came into force, and that therefore the enactments had no application to her right to a license to be re-married. We have carefully considered all that is urged in the brief of counsel in support of this contention. The prohibition of re-marriage within the specified time after the rendition of a decree of divorce is to be found in an additional section added to and as an amendment to the act entitled "An act to revise the law in relation to divorce," in force July 1, 1874, and it is argued that the title to that act is not broad enough to include legislation changing the statute providing for and with reference to the issuance of licenses to marry, and therefore cannot, within the constitutional intent, be held to apply to applications for the issuance of such licenses. This contention overlooks the fact that at the same session of 1905 of the General Assembly an act was adopted amending the act to revise the law in relation to marriage, approved February 27, 1874, under which licenses to marry were authorized to be issued. Section 6 of the amendment of 1905 to the Marriage law, among other things, made it the duty of the county clerk to obtain an affidavit from at least one of the parties contemplating the marriage, "for the purpose of ascertaining the age of the parties and the legality of the contemplated marriage." Section 13 of the said Marriage act, prior to the amendment of 1905, made the clerk liable to the payment of a fine in the

event he issued a license for the marriage of persons under legal age without the consent of the parent or guardian of such minor. By the amendment of 1905 to said section 13 the county clerk is declared to be guilty of a misdemeanor and made subject to a fine of not less than \$100 nor more than \$500 if he shall "knowingly issue a license for the marriage of persons who are legally incapable of contracting a marriage." It will thus be seen that the amendment of 1905 to the Divorce act is not an amendment to the marriage statutes, and therefore it was not necessary to state in the title to the divorce amendment anything with reference to marriages. The statute relating to marriages, as amended, does not, nor did it originally, purport to state all grounds which render persons incompetent to enter into the marriage relation. When application is made to the county clerk to issue a license to persons to marry by virtue of the provisions of the amendment to section 3, it becomes his duty to inquire into everything affecting the competency of the persons applying for the license to enter into such relation. His duty under this section, prior to the amendment, only required him to inquire as to the age of the parties. By the amendment it became his duty, in order to avoid liability to pay a fine, etc., to refer to the Divorce act, and determine whether such persons so applying, who had been divorced, were competent persons to marry.

The enactments are neither *ex post facto* laws nor does the construction we give them make them operate retrospectively. Decrees granting divorces which were entered before July 1, 1905, the date at which the acts, respectively, became effective, remain in full force and virtue and wholly unaffected by the enactments. That which is forbidden and made the subject of the imposition of penalties and of criminal punishment are acts of the parties after the first day of July, 1905. Prior to that date a person who had, within a period of less than one year, been divorced might have lawfully applied for and received license to re-marry, and the

clerk might lawfully have issued such license within that period. But under the amendatory acts the re-marriage of such divorced person within the prescribed period was prohibited, and that which is declared illegal and rendered punishable is the act subsequent to July 1, 1905, and is not any impairment of the decree of divorce. The right to re-marry does not accrue from a decree of divorce, but from the existing law regulating the issuance of licenses to marry. Prior to July 1, 1905, under the statute then in force, male persons over the age of seventeen years and females over the age of fourteen years were competent to enter the marriage relation. After the amendment of 1905 the age of competency to contract was raised and persons of those ages became no longer competent to be joined in marriage. The amendment, therefore, operated to render incompetent to marry after July 1, 1905, on the ground of nonage, persons who prior to that date could lawfully contract matrimony. As to persons who had been divorced after the passage of the amendatory act and before the first day of July, the amendatory legislation had the same effect, in that it so changed the existing law as to the right of persons to contract matrimony until the expiration of a specified time after the rendition of a decree of divorce.

No one will contend that it is not within the power of the legislature to raise the age of competency to contract and be joined in marriage though such enactment deprived persons of a privilege or right which they enjoyed under previous legislation, and it is equally clear that the fact that a party had been divorced from a previous marriage may be legally declared to constitute a disqualification to the right to receive license and contract a second marriage within a reasonable time specifically stated in the statute.

We think the statutes under consideration became operative and effective after July 1, 1905, infringed no constitutional right of the relators or either of them, and their provisions became obligatory upon the county clerk, and that

he properly refused to issue a license to the relators to intermarry.

The judgment of the circuit court must therefore be reversed and the cause will be remanded.

Reversed and remanded.

THE PEOPLE *ex rel.* F. R. Power *et al.*

v.

JAMES A. ROSE.

Opinion filed December 20, 1905.

1. **TRADE NAMES**—*when use of a trade name may be enjoined.* A company which has conducted business for many years under a name by which it has become well known may enjoin the use of such name as a trade name by other parties, whose intention is to deceive the public and thereby to fraudulently obtain business intended for the former company.

2. **MANDAMUS**—*when Secretary of State cannot be compelled to issue certificate of incorporation.* The Secretary of State can not be compelled by *mandamus* to issue a certificate of incorporation under a name the use of which by the corporation may be enjoined by an existing concern which has established its business under that name.

3. **SAME**—*mandamus will not issue in a doubtful case.* *Mandamus* will not issue to compel the Secretary of State to issue a certificate of incorporation under the name of an existing concern upon the ground that the latter is a foreign corporation which has not complied with the laws of Illinois, and is therefore not entitled to transact business in Illinois nor to protection in the use of its trade name, where the record leaves in doubt the question whether such concern is a foreign corporation or a mere partnership.

4. **CORPORATIONS**—*a joint stock company is not a corporation.* A joint stock company, although possessing many of the characteristics of a corporation, is a partnership, and not a corporation.

5. **SAME**—*provision of Criminal Code prohibiting use of corporate name construed.* The provision of the Criminal Code imposing a penalty upon use of a corporate name by an unincorporated concern is intended to prevent the obtaining of fictitious credit, and the mere use of a corporate name, unattended with any fraudulent intentions or consequences, is not a violation of the statute.

6. SAME—*violation of statute against use of a corporate name merely involves payment of fine.* The use of a corporate name by an unincorporated company, even in a manner constituting a violation of the statute, can be attended with no other consequences than liability to pay the fine therein provided for, and does not invalidate contracts of the company, nor justify the Secretary of State in issuing a certificate of incorporation under its name to third parties intending to use the name to mislead the public into giving it business intended for the old company.

ORIGINAL petition for *mandamus*.

This is an original petition for *mandamus*, filed in this court on June 8, 1905, by the People upon the relation of F. R. Power, Patrick L. Touhy, F. G. Crary and F. A. Andrews against James A. Rose, Secretary of State, praying that a writ of *mandamus* issue, directed to said Rose, as Secretary of State, commanding him as hereinafter set forth. Rose, as Secretary of State, filed an answer to the petition. The petitioners or relators above named filed a demurrer to the answer of the Secretary of State. The case comes before this court upon the issue made by the demurrer to the answer.

The petitioners, who are of Chicago in Cook county, allege in their petition that on February 23, 1905, one of the petitioners, Patrick L. Touhy, and William H. Peacock and F. T. Donovan, acting as commissioners under the Corporation act of Illinois and the amendments thereto, filed in the office of the Secretary of State at Springfield a statement or application for a license to open books of subscription to the capital stock of a company to be known as or named "United States Express Company," with a capital stock of \$2500.00 to be divided into twenty-five shares of \$100.00 each; that the object, for which the company was to be formed, was to receive, carry and transport for hire packages large or small, and to do a general express business, the life of the company to be ninety-nine years with its principal office in Chicago; that the said statement or application was duly signed and acknowledged according to law by the commissioners,

and the fee of \$30.00, as required by law, was on said day paid to the Secretary of State, who did on February 23, 1905, issue a license to said commissioners, authorizing them to open books of subscription to the capital stock of United States Express Company, which said license is signed by the Secretary of State, and sealed with the great seal of State, copy being attached to the petition; that the commissioners opened books of subscription for the capital stock of the United States Express Company, and the stock was all subscribed for, to-wit, Patrick L. Touhy, one share, \$100.00; F. R. Power twenty-three shares, \$2300.00; F. G. Crary, one share, \$100.00; that thereafter the commissioners on March 6, 1905, at Chicago at two o'clock P. M., convened a meeting of the subscribers of stock, pursuant to notice required by law, for the purpose of electing a board of directors, etc., which notice was deposited in the post-office, properly addressed to each subscriber, ten days before the time fixed for the meeting; that the subscribers met at the time and place specified in the notice, and proceeded to elect directors, and that the following persons were duly elected for the term of one year: Patrick L. Touhy, F. R. Power, and F. A. Andrews; and that the post-office address of said company is at 171 Washington street in Chicago; that thereupon the commissioners made a report of their acts and doings as such to the Secretary of State, stating therein that they opened books of subscription; that the stock was fully subscribed, and giving a copy of said subscription, and that pursuant to notice, copy of which is set forth, the subscribers to the stock met and elected directors as above stated, and also stating in said report that the post-office address of said company was No. 171 Washington street, room 303, in Chicago, which said report was on March 6, 1905, sworn to before a notary public by said commissioners. The petition further states that the said report was mailed to the Secretary of State, and by him received at his office in Springfield on or about March 9, 1905; that there is no

company chartered under the laws of Illinois to do business in the name of United States Express Company, and that there is no foreign company or corporation, licensed to do business in Illinois in the name of United States Express Company; that, when the Secretary of State received said report, being in all respects as by law required, it was his legal duty to file the same in his office, and issue the final certificate of incorporation of said company; yet, that the said Rose, so being such Secretary of State, wholly refused and still refuses to file said report, and to issue the final certificate of incorporation of said company, as required by the statute; that the said Rose, as such Secretary, has returned said report to petitioners, and refused and refuses to complete the final organization of said company by receiving and filing said report, and issuing the final certificate of incorporation; by means whereof the petitioners are denied the right of becoming a corporation under the name of "United States Express Company," to which they are justly and lawfully entitled. Petitioners, therefore, pray a writ of *mandamus*, directed to said Rose, Secretary of State, commanding him forthwith to receive the said report of said commissioners, and to file said report, and to issue a certificate of the complete organization of said corporation, and that such further order may be entered in the premises as justice may require. The said petition was sworn to by Patrick L. Touhy, one of the commissioners, on April 18, 1905.

The answer of the respondent, the Secretary of State, was filed on June 14, 1905, and alleges that the court is without jurisdiction to hear and determine the matters set out in the petition; that respondent does not deny any of the allegations of fact in the petition, except that he has no knowledge, and therefore neither admits nor denies the allegations respecting the opening of books for subscription to the capital stock aforesaid, or whether the stock was fully subscribed, or whether a meeting of the subscribers was convened and held according to law, or whether a board of di-

rectors was elected as alleged. The answer denies that it is the legal duty of respondent to issue a final certificate of incorporation to said United States Express Company; and further denies that said petitioners, or any of them, have a right to incorporate under the laws of Illinois under the name of "United States Express Company." The answer further states that, when the license was issued out of respondent's office, it was done by one of his clerks, who supposed at the time that the parties, desiring to incorporate under the said name, were the same persons interested in the company hereinafter mentioned known as "The United States Express Company," and that no question was made at the time concerning the issuing of said license; that subsequently thereto respondent was informed that the parties, to whom the license had been issued, were in nowise interested in the United States Express Company hereinafter mentioned; "that there is now in existence a joint stock company, called 'United States Express Company,' organized and doing business under the common law and statute law of the State of New York, and that the United States Express Company here referred to will hereinafter be mentioned as the old United States Express Company;" that "said old United States Express Company was organized, as a joint stock association or joint stock company, on the 22d day of April, 1854, in the State of New York, and that said old United States Express Company thereupon entered upon the transaction of a general express business throughout the United States, and has been ever since engaged in said business, and is now engaged in the same in every State and territory of the United States, as well as in the dominion of Canada, and in foreign countries; that the said old United States Express Company carries on its business upon various railroads and steamship lines throughout the United States and Canada, and also in foreign countries; and that its business in a general way consists of the transporting and delivering of large and small packages of freight, merchan-

dise, valuable documents, papers and moneys, and that it has been engaged in said business continuously ever since the time of its organization as aforesaid; that its name is placed upon express cars on various railroads in the United States, and upon its wagons used to transport the merchandise, papers and moneys above referred to, and that said old United States Express Company is possessed of and operating many hundreds of wagons by means of thousands of horses owned by it, and that the name 'United States Express Company' is well known throughout all of the United States and foreign countries, as a company engaged in the transportation and delivery of merchandise, valuable packages, and money, for hire."

The answer further says that, subsequent to the issuance of said license and prior to the time of his receiving the report of the commissioners, he was informed and believes it to be true, that the use by any persons of said name, whether associated as incorporators or as co-partners or as individuals, would be a fraud upon the old United States Express Company; that his attention has been called to the fact that, in the month of March, 1883, there was filed in the United States Circuit Court for the Southern District of Illinois a certain bill of complaint, by Thomas C. Platt, a citizen of the State of New York and president of the United States Express Company (that is to say, the old United States Express Company), upon whose behalf he filed said bill, by virtue of the articles of association of said joint stock company and by virtue of the laws of the State of New York, against Oscar C. St. Clair and others, citizens of the State of Illinois, setting forth that the defendants claimed to have been organized under the laws of Illinois as the United States Express Company, and that the use by them of the name "United States Express Company" would be a fraud upon the rights of the old United States Express Company, and that the use of such name, even although a corporate name, was illegal, and said bill prayed that the defendants

might be forever enjoined and restrained from the use of the said name of United States Express Company; that, on May 31, 1884, a decree was entered in said cause as follows: "This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz.: That the organization of an express company by the defendants, Oscar C. St. Clair, Elon P. House, Charles A. Clowes, and United States Express Company, for the purpose of carrying on an express business, under the laws of the State of Illinois, and under the name of the 'United States Express Company,' is illegal and unauthorized by law; and that the conduct of an express business by said defendants, or either of them, under said name, 'United States Express Company,' is illegal and unauthorized by law; that the injunction heretofore granted in this cause on the 21st day of July, A. D. 1883, to restrain the said defendants, * * * their counselors, attorneys, solicitors, trustees and agents, and each and every one of them, from carrying out their purpose of organizing a corporation under the laws of the State of Illinois, under the name of the United States Express Company, or from transacting or carrying on an express business either in Illinois, or elsewhere, under the name of the United States Express Company, either as individuals or as a corporation, be, and the same is made hereby perpetual in the premises, according to the prayer of the bill. And it is further ordered, adjudged and decreed that the plaintiff recover costs against the defendants to be taxed by the clerk under the direction of the court."

The answer further says that the petitioners are not, and, prior to the filing of the said bill, were not, nor was any of them engaged in the express business; that the incorporation of said persons under the name "United States Express Company" is a new venture, and, so far as the objects of said incorporation relative to the doing of an express business are

concerned, it is a matter concerning the future and it is not intended that said corporation shall take over or continue any existing express business; that respondent then believed and now believes that petitioners had no right to become incorporated under the laws of Illinois as the United States Express Company, and for these reasons has refused and does refuse to issue a final certificate of incorporation to the said persons as "United States Express Company."

The demurrer, which was filed to the answer on June 17, 1905, is both general and special, and sets forth the following causes of demurrer to the answer: First: The answer admits all the allegations of fact in the petition, which it is necessary to prove; the license issued by the Secretary is under his hand and the great seal of the State of Illinois, and it is not claimed that any deception was practiced by plaintiffs in obtaining it; the sworn report of the commissioners is all the law requires as to the subscription of stock, election of directors, etc.; that the admitted facts make out a case for plaintiffs; that the new facts set up are not sufficient to bar the action; that the United States Express Company, organized under the laws of the State of New York, is either a corporation, or it is not a corporation; if it is a corporation it has not complied with the law of this State in relation to foreign corporations doing business in the State; that it is not licensed to do business in this State; and, if it is not a corporation, the court had no jurisdiction in the case of *Thomas C. Platt, etc. v. Oscar St. Clair et al.*, above described, in which an injunction was issued against the defendants therein on July 21, 1883; that it is only upon the ground that the United States Express Company, organized under the laws of New York, was a corporation, that the court could acquire jurisdiction in the above case, and, if it be held to be a corporation, the allegations in the bill are not sufficient to give the court jurisdiction, which it did not have; that the statute of our State, which requires foreign corporations to obtain a license from the Secretary of State,

in order to do business in this State, was enacted more than ten years after the decision in the cases referred to; that if it be a corporation, the United States Express Company of New York has no right to do business in this State, as it is not licensed to do so. *Second*, if said express company is not incorporated, then it has no right to use the name "United States Express Company" in the transaction of its business within the State of Illinois; that it is an offense against a certain section of the Criminal Code to assume and use a corporate name, not being incorporated; that such illegal use of the name would prevent the company from claiming protection in the use of the name, as a trade name; that it has no right to use the name in the State if not incorporated; that the name "United States Express Company" certainly imports a corporation.

A. L. FLANINGHAM, for relators:

The United States Express Company, organized under the laws of the State of New York, is an association of individuals authorized by law, and has been and is doing business as a legal entity or legal person under a corporate name. It has all the rights and privileges, and it uses and exercises all the franchise rights and privileges, of a corporation except that of a common seal, and it could use a seal if it desired to do so. In short, it is a foreign corporation which has not complied with the law of the State of Illinois in relation to foreign corporations doing business or wishing to do business within this State, and as such foreign corporation it has no rights, either legal or equitable, within the State of Illinois. *Paul v. Virginia*, 8 Wall. 168; *Philadelphia Fire Ass. v. New York*, 119 U. S. 110; *Mining Co. v. Pennsylvania*, 125 id. 186; *Coal Co. v. Hamblen*, 23 Fed. Rep. 225.

The laws of the State of New York have no force or effect within the State of Illinois, and said express company, until it has complied with the laws of our State, has no lawful existence within the State. *Railroad Co. v. Wheeler*,

66 U. S. 286; *Bridge Co. v. Adams County*, 88 Ill. 615; *Bridge Co. v. Wooley*, 78 Ky. 523.

It is only by comity of the State that a foreign corporation can be admitted to do business within the State. *Carroll v. East St. Louis*, 67 Ill. 568; *Walker v. Springfield*, 94 id. 364.

A foreign company or corporation cannot come into the State and contest the right of a domestic corporation to use the same name as used by the foreign company. *Hazelton Boiler Co. v. Hazelton Tripod Boiler Co.* 142 Ill. 494; *Coal Co. v. Hamblen*, 23 Fed. Rep. 225.

If the United States Express Company organized under the laws of the State of New York is not a corporation, then it has no right to use the name "United States Express Company" in the transaction of business within the State of Illinois. The Criminal Code of this State makes it an offense to assume and use a corporate name in transacting business, not being incorporated. Hurd's Stat. 1903, par. 220, p. 657.

The wrongful assumption and use of a corporate name will deprive the company of the right to protection of its name as a trade name. *Clark v. Iron Works*, 44 Ill. App. 510.

Any fraud or deception practiced by the company in the use of its name, as against the public, will prevent it from claiming protection of its name as a trade name. *Medicine Co. v. Wood*, 108 U. S. 218; *Holzappel's Composition Co. v. American Co.* 183 id. 1; *Pearline Manf. Co. v. Chemical Co.* 118 Fed. Rep. 103; *Koehler v. Saunder*, 122 N. Y. 65; *Sterling Silk Manf. Co. v. Sterling Silk Co.* 59 N. J. Eq. 394.

W. H. STEAD, Attorney General, and J. R. CUSTER, for respondent:

Before the court will issue the writ of *mandamus* it must not only appear that it is the duty of the respondent to issue the final certificate, but that it is the right of the relators to have it issued; also, the writ will not be issued if it would fail to accomplish a good purpose or have a beneficial effect.

Watch Case Co. v. Pearson, 140 Ill. 434; *People v. Lieb*, 85 id. 484; *People v. Ketchum*, 72 id. 212; *Cristman v. Peck*, 90 id. 150.

The United States Express Company can, through its president, and probably through one or more of its members on behalf of all, maintain suits for injunction. 1 Daniell's Ch. 190, note; 1 Foster's Fed. Pr. (3d ed.) secs. 46, 47, 107-109, 111; Story's Eq. Pl. (9th ed.) secs. 107-109, 111; *Stewart v. Dunham*, 115 U. S. 61; *Belmont Nail Co. v. Columbia, etc.* 46 Fed. Rep. 336; *American Steel Co. v. Unions*, 90 id. 605.

The fact that the express company is not a corporation does not prevent it from using the name "United States Express Company," notwithstanding section 220 of the Criminal Code. The acts or contracts of persons offending are not made void by the statute. It is not the mere use of the name which is prohibited. *Edgerton v. Preston*, 15 Ill. App. 23; *Brewing Co. v. Vinterum*, 67 id. 559; *Imperial Manf. Co. v. Schwartz*, 105 id. 525; Collyer on Partnership, sec. 159.

It is within the right and power of the United States Express Company to restrain the use of its name by others. *Lane v. Brothers*, 120 Ga. 355; *Aiello v. Montecalfe*, 21 R. I. 496; *Rudolph v. Southern Beneficial League*, 23 Abbott's N. C. 199; *Black Rabbit Ass. v. Munday*, 21 id. 99; *International Committee Y. W. C. A. v. Y. W. C. A.* 194 Ill. 194; *Peck Bros. & Co. v. Peck Bros.* 113 Fed. Rep. 291; *McLean v. Fleming*, 96 U. S. 245; Hopkins on Unfair Trade, 108; *Celluloid Manf. Co. v. Cellonite Manf. Co.* 32 Fed. Rep. 94; *McGlynn v. Post*, 21 Abbott's N. C. 97.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

By the demurrer to the answer the allegations of fact in the answer are admitted to be true. Under these allegations, as set forth in the statement preceding this opinion, the com-

pany, referred to in the answer as the "old United States Express Company" would have the right and power to restrain by injunction the use of its name by petitioners herein, or by the new corporation, which they propose to form.

In *International Com. Y. W. C. A. v. Y. W. C. A.* 194 Ill. 194, we held that, although generic terms or mere descriptive words are the common property of the public, and not ordinarily susceptible of appropriation by an individual, yet an injunction may issue to restrain the use of such terms, or words, at the suit of one, who has already adopted them, where the evidence shows a fraudulent design, and that the public will be misled. In cases referred to and quoted from in the *Y. W. C. A. case, supra*, it was held that, although certain plaintiffs had no exclusive right to the words "Conveyance Company," or "London Conveyance Company," or any other words, they had a right to call upon a court of chancery to restrain the defendant from fraudulently using precisely the same words and devices, which they had taken for the purpose of distinguishing their property, and thereby depriving them of the fair profits of their business by attracting custom on false representation, that carriages, really belonging to the defendant, belonged, and were under the management of the plaintiff. It was there held that, although there was no property in the words, "The Guinea Coal Company," yet it was a fraud on a person, who had an established trade and carried it on under a given name, that some other person should assume the same name with a slight alteration, as "The Pall Mall Guinea Coal Company," in such a way as to induce persons to deal with him in the belief that they are dealing with the person, who has given a reputation to the name; in other words, "that it is a fraud on the part of a defendant to set up business under such a designation as is calculated to lead, and does lead, other people to suppose that his business is the business of another person."

In *McLean v. Fleming*, 96 U. S. 245, it is said: "Nor is it necessary, in order to give a right to an injunction, that a specific trade-mark should be infringed, but it is sufficient that the court is satisfied that there was an intent on the part of the respondent to palm off his goods as the goods of the complainant." The same doctrine is announced in the following cases, to-wit: *Lane v. Brothers, etc.* 120 Ga. 355; *Aiello v. Montecalfe*, 21 R. I. 496; *Rudolph v. Southern Beneficial League*, 23 Abbott's N. C. 199.

In the case at bar, the old United States Express Company had had an established business in the United States, and in foreign countries, for more than fifty years, when the petitioners made application to the Secretary of State to organize a corporation in Illinois under the same name, to-wit, the "United States Express Company." It appears from the allegations in the answer that the incorporation of the new company, under the same name as the old company, would be a fraud upon the old company, as being an attempt to take away from it a part of its business, and to deceive the public into the belief that, when dealing with the new company, they were, as matter of fact, dealing with the old company. Indeed, the answer specifically alleges that the action, proposed to be taken by the commissioners, would be a fraud upon the old company, and the demurrer to the answer admits this allegation.

It being true, then, that the old company would be entitled to file a bill in chancery to enjoin the new corporation, proposed to be organized, from doing business under the same name as the old company, the writ of *mandamus* will not issue to compel the Secretary of State to issue a certificate of organization to the new company. The writ of *mandamus* will not be issued, if its issuance would fail to accomplish a good purpose, or to have a beneficial effect. "The writ is not granted as a matter of absolute right, and where it can be seen that it cannot accomplish any good purpose, or that it will fail to have a beneficial effect, it will be

denied." (*Cristman v. Peck*, 90 Ill. 150; *People v. Lieb*, 85 id. 484; *Illinois Watch Case Co. v. Pearson*, 140 id. 423). It is difficult to see how the issuance of the writ in this case could accomplish any good purpose, or have any beneficial effect, if the new corporation, proposed to be organized, could be enjoined from using the name of the old company, and doing business under that name.

It is contended, on the part of the petitioners, that the old United States Express Company is a foreign corporation, organized under the laws of New York, and that, as such foreign corporation, it cannot be admitted to do business in Illinois, except by comity of the latter State. It is furthermore insisted that the old United States Express Company cannot do business in this State, or maintain any suit in the courts of this State, because it has not obtained a license so to do business in Illinois from the Secretary of State of Illinois. Many decisions are referred to by counsel in support of this position. The argument proceeds upon the supposition that the old United States Express Company is a foreign corporation. It does not appear, however, clearly, upon this record, that it is a foreign corporation.

The answer avers "that there is now in existence a joint stock company called United States Express Company, organized and doing business under the common law and statute law of the State of New York." The demurrer to the answer admits this allegation to be true. For the purposes of this case, therefore, the old United States Express Company is to be regarded as a joint stock company, organized and doing business under the common law, as well as the statute law of the State of New York. A joint stock company is defined in the text books to be "an association of individuals for purposes of profit, possessing a common capital, which is divided into shares, of which each member possesses one or more, and which are transferable by the owner. These associations, formed for business purposes, were at common law, and, as a general rule, still are considered

merely as partnerships, and their rights and liabilities are in the main governed by the same rules and principles, which regulate commercial partnerships." (17 Am. & Eng. Ency. of Law,—2d ed.—pp. 636, 637). While it is true, that many companies, called joint stock companies, have many of the essential characteristics of a corporation, yet there is a distinction between such companies and regularly organized corporations, so-called. In 17 Am. & Eng. Ency. of Law,—2d ed.—p. 638, it is said: "In respect to their formation there is a broad distinction between a corporation, technically so called, which always owes its existence to the sovereign power of the State, and a joint stock company, which, being essentially a partnership, is brought into being by the contract of its members *inter sese*." Counsel refer to cases in other States, and in the Federal courts, holding that joint stock companies possess many of the characteristics of corporations, but the definition, which characterizes them as partnerships, has been recognized as correct, if not actually adopted, by the decisions of the Illinois courts.

In *Robbins v. Butler*, 24 Ill. 387, this court, speaking through Mr. Justice BREESE, said (p. 426): "These stock companies are nothing more than partnerships, and every member of the company is liable for the debts of the concern, no matter what the private arrangements among themselves may be, if they have not shifted their liability in the very mode pointed out in the articles of association." (See also *Pettis v. Atkins*, 60 Ill. 454; *Hodgson v. Baldwin*, 65 id. 532). In *Wadsworth v. Duncan*, 164 Ill. 360, this court speaking through Mr. Justice PHILLIPS, again said, endorsing the doctrine announced in *Robbins v. Butler*, *supra*, as follows: "The members of a joint stock association are partners, and each member is liable for the debts of the association, unless he has shifted his liability in the very mode pointed out in the articles of association."

In view of what has been said, it is not altogether certain that the old express company, which is admitted here

to be a joint stock company, is such a foreign corporation, as is required by our statute to file a copy of its charter, or articles of incorporation, or certificate of incorporation, in the office of the Secretary of State. The statute, imposing the requirement in question upon a foreign corporation desiring to do business in this State, speaks of "every company incorporated for the purposes of gain under the laws of any other State," etc., and, in the subsequent part of the section, which uses the words just quoted, the company, so incorporated, is referred to as "such corporation," and not as "such company;" and it would seem to be the proper construction of the statute in question, (4 Starr & Cur. Ann. Stat.—sup. ed.—p. 310), that it refers to regularly organized corporations, rather than to joint stock companies. This is so, because, as has already been stated, the corporation, technically so called, owes its existence to the sovereign power of the State, while the joint stock company, being merely a partnership, is brought into being by contract of its members. The statutory requirement embraces foreign corporations, rather than joint stock companies, because the former owe their existence to the power of a foreign State; and statutes in relation to requirements, imposed upon foreign corporations, concern the creatures of the foreign States, and not the creatures, which are brought into being by the mere contract of parties. In the case at bar, the provisions of the instrument, or articles of organization, under which the old United States Express Company acts, and does business, are not anywhere set forth in the present record. We are unable to say what the terms of its articles of association are, as they are not set forth in the pleadings. But whether the view, thus taken of the character of the old United States Express Company, is correct or not, it is certainly a matter of doubt whether it is a corporation, or a mere partnership. Under these circumstances the writ of *mandamus* will not be issued. "The writ is never granted in doubtful cases, nor unless the party asking it has a clear right."

(High on Ex. Legal Rem. sec. 9; *Illinois Watch Case Co. v. Pearson, supra.*)

It is furthermore contended by the petitioners herein that, if the old United States Express Company is not a corporation, then it had no right to use the name, "United States Express Company," in the transaction of business in the State of Illinois. This contention is based upon the alleged ground that the Criminal Code of this State makes it an offense to assume and use a corporate name in transacting business, not being incorporated. The provision of the Criminal Code thus referred to reads in part as follows: "If any company, association or person puts forth any sign or advertisement, and therein assumes, for the purpose of soliciting business, a corporate name, not being incorporated, * * * such company, association or person shall be fined not less than \$10.00, nor more than \$200.00, and a like sum for each day he or it shall continue to offend, after having been once fined." (1 Starr & Curt. Ann. Stat.—2d ed.—p. 1332, sec. 368).

The section of the Criminal Code above quoted was passed in March, 1869, either in the above or a more stringent form. The answer shows that the old United States Express Company was organized in 1854, fifteen years before this statute was passed, and had been doing business throughout the country for many years before its passage. During the years prior to its passage when it was thus transacting business, it cannot be said that it was not doing business in good faith, or that it was doing business with any intention of violating the law in question, because the law in question was not then in existence. It is to be observed, however, that the statute does not denounce the assuming of a corporate name, but the putting forth of a sign or advertisement, and thereby assuming a corporate name for the purpose of soliciting business. It cannot be said here that the old company in question put forth its corporate name for any such purpose. "What the legislature had in view

in enacting this section of the Criminal Code manifestly was to prevent persons from obtaining a fictitious credit by advertising themselves as being a corporation when they were not incorporated." (*Edgerton v. Preston*, 15 Ill. App. 23). Under the allegations of the answer herein, which are admitted to be true by the demurrer, it cannot be said that the old company here under consideration was in any way advertising itself as a corporation for the purpose of obtaining a fictitious credit. Before the criminal statute was passed, it already had a credit, which was not fictitious, so far as the present record shows. The fraud, which the criminal statute in question seeks to punish or to prevent, is the use of a name in such a way as to deceive the public, and it is the deception or improper use of the name, and not the name itself, which constitutes such fraud. "It is not, therefore, enough to show the mere use of the name to make out a violation of the statute; there must be some evidence, at least, tending to show such use as the statute forbids." (*Imperial Manf. Co. v. Schwartz*, 105 Ill. App. 525).

It is furthermore to be observed that this criminal statute does not make contracts, made by persons guilty of the offense prohibited, invalid, but merely provides that such persons shall be liable to pay a certain fine. It would appear, therefore, that a violation of the statute can be attended with no other consequences than merely the infliction of the penalty therein prescribed. (*Edgerton v. Preston, supra.*)

For the reasons above stated, we are of the opinion that the Secretary of State properly refused to issue a certificate of complete organization of the new corporation proposed to be organized by the petitioners, and that the prayer of the petition herein for a *mandamus* must be and is denied.

Writ denied.

THE COUNTY OF CARROLL

v.

GEORGE DURHAM.

Opinion filed December 20, 1905.

1. FEES AND SALARIES—*fees of the office do not belong to the sheriff.* The fees of the sheriff's office do not belong to the sheriff, but constitute a fund out of which he has a right to deduct his salary and pay the expenses of his office, as previously determined by the county board, and the balance, if any, belongs to the county.

2. SAME—*special bailiff appointed to serve special venire need not be an officer.* The person selected by the court, under section 13 of the Jurors act, to serve a special venire when the sheriff is disqualified, may be any person, whether an officer or not; and the fact that the person selected in a particular case is a constable does not make any difference as to his power and duties nor as to his compensation.

3. SAME—*compensation for services of special bailiff in serving special venire should be fixed by the court.* A special bailiff appointed to serve a special venire is not entitled to the fees allowed by law to a sheriff for summoning jurors, but his compensation should be fixed by the court at a just and reasonable amount for the time actually employed and for necessary traveling expenses.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Carroll county; the Hon. RICHARD S. FARRAND, Judge, presiding.

At the trial of a certain criminal case in the circuit court of Carroll county the regular panel of jurors was exhausted by reason of challenges thereto. The court ordered a special venire to be issued for fifty jurors to fill the panel for the trial. Objection was made by the defendants to the service of this venire by the sheriff, and the appellee, George Durham, was appointed as a special bailiff by the court for this purpose. At the time of appellee's appointment he was a regularly elected, qualified and acting constable in and for

the township of Woodland, in said county. He worked two days and served fifty jurors for which he made a return, charging fifty cents for each man served and five cents per mile for five hundred and six miles traveled, making a total of \$50.30. This amount the county board refused to pay and appellee brought an action of assumpsit for the same. After the commencement of the suit a tender of \$22.05 was made, being two days' pay at \$2.50 per day, \$7.05 costs and \$10 expenses. A plea of the general issue, together with a special plea of tender, were filed to appellee's declaration. A demurrer was filed to these pleas and sustained by the court. A plea of the general issue was then filed, together with notice of the tender. Upon a trial before the court and a jury judgment was rendered against appellant for \$50.30, which has been affirmed by the Appellate Court, and a further appeal has been prosecuted to this court.

FRANKLIN J. STRANSKY, for appellant:

Compensation for official services rendered in behalf of the State or a public corporation must rest alone upon statutory enactment. An officer can recover for services if payment therefor be provided by the statute, otherwise not, and can have, in any event, only such amount as may be allowed by the statute. *Dougherty v. People*, 42 Ill. App. 494; *Moore v. People*, 37 id. 641; *Schnadt v. Davis*, 185 Ill. 476; *Roby v. Trust Co.* 194 id. 233; *Rickert v. Suddard*, 184 id. 149; *Henderson v. State*, 40 L. R. A. 426; *Smith v. McLaughlin*, 77 Ill. 596; *Foreman v. People*, 209 id. 569; *State v. Brewer*, 59 Ala. 130; *Wotham v. Grayson County*, 76 Ky. 53; *DeBolt v. Trustees*, 7 Ohio St. 237; 4 Am. & Eng. Ency. of Law, (1st ed.) 314; 1 Dillon on Mun. Corp. 311; *Colts County v. Messer*, 195 Ill. 546.

Costs and fees are purely matters of statutory regulation, and courts have no power to adjudge them as against any one on mere equitable grounds. The court must look to the statute as its warrant or authority. *Eimer v. Eimer*,

47 Ill. 373; *Poppers v. Meagher*, 33 Ill. App. 20; *Constant v. Matteson*, 22 Ill. 546.

In the absence of statutory enactment allowing compensation, a sheriff is not entitled to compensation for summoning grand jurors. *Bryner v. Commissioners*, 24 Ill. 195.

The law of fees and costs is strictly construed, and an officer demanding fees for services rendered must point to some clear and definite provision of the law which authorizes the demand, and compensation will not be allowed unless it is conferred by a strict construction of the statute. *Tolbert v. Hale County*, 30 So. Rep. 453; *State v. Brewer*, 59 Ala. 130; *Hempstead Co. v. Jones*, 62 Ark. 272; *United States v. Clough*, 55 Fed. Rep. 373; 23 Am. & Eng. Ency. of Law, (1st ed.) 402; 4 id. 314, 315; *Schnadt v. Davis*, 185 Ill. 476; *Alexander County v. Myers*, 64 id. 37.

The fees earned and collected by a county officer constitute the only fund out of which his compensation can be paid, and any attempt on the part of the county to appropriate other funds of the county in payment would be *ultra vires* and void. *LaSalle County v. Milligan*, 143 Ill. 321; *Coles County v. Messer*, 195 id. 540; *Fayette County v. Jennings*, 97 id. 419; *Bryan v. Supervisors*, 24 id. 195; *Irvine v. Alexander County*, 63 id. 528; Rev. Stat. chap. 53, secs. 51-53.

The compensation of a county officer can only be paid out of the fees actually collected. He takes the office *cum onere*, and no responsibility rests upon the county to make up a deficit after exhausting the fees collected. *Coles County v. Messer*, 195 Ill. 546; *Wheelock v. People*, 84 id. 551; *Cullom v. Dolloff*, 94 id. 330; *Briscoe v. Clark County*, 95 id. 309.

A person appointed by the court to serve a special venire for jurors is not entitled to the same compensation which the law allows the sheriff for like services. *Brantley v. State*, 63 Tenn. 307.

The fees provided by the statute are only allowed to the sheriff, and no other person performing the same services

as the sheriff is empowered to perform can recover such fees. *Scott County v. Drake*, 71 Ill. App. 280; *Seibert v. Logan County*, 63 id. 155; *Union County v. Patton*, 63 id. 458; *People v. Foster*, 133 id. 505; *Railroad Co. v. Dunning*, 18 id. 494.

RALPH E. EATON, for appellee:

Special matters in defense can only be set up in notice where the general issue is pleaded. *Starr & Cur. Stat. chap. 110, sec. 29.*

A defendant cannot plead the general issue and set up the defense of tender at the same time. *JoDaviess County v. Staples*, 108 Ill. App. 539.

In no sense does the notice provided for take the place of the general issue. *Bailey v. Bank*, 127 Ill. 332.

In this case it was not necessary for plaintiff to prove that he had filed his account with the board of supervisors and that it was not allowed. *Town of Ross v. Collins*, 106 Ill. App. 396.

The court is only empowered to appoint a special bailiff to summon jurors where an objection has been made to the sheriff. *Healy v. People*, 177 Ill. 306.

Unless it was the intention of the legislature that the special bailiff mentioned in section 13 of chapter 78 of our statutes was to receive just compensation for his services as such bailiff then that section of the statute is certainly unconstitutional, and the court could force no citizen to act as such bailiff. *Ritchie v. People*, 155 Ill. 98; *Carrollton v. Bazette*, 159 id. 294.

It is the duty of courts to so construe statutes as to uphold their constitutionality and validity if it can reasonably be done, and if the proper construction is doubtful the doubt should be resolved in favor of the validity of the law. *Arms v. Ayer*, 192 Ill. 601.

As to fees allowed for summoning jurors, see section 19 of chapter 58, in reference to fees and salary.

In passing upon the right of public officers to compensation, contemporaneous, uniform and practical construction of a constitutional provision or statute by the legislative department and the executive officers charged with the duty of enforcing the provision or statute will be given great weight by the courts, and, in general, will be allowed to control where the construction is doubtful. *Nye v. Foreman*, 215 Ill. 285.

Mr. JUSTICE WILKIN delivered the opinion of the court:

The errors assigned question the ruling of the court in holding the county liable for the amount claimed. Section 9 of article 10 of the constitution of 1870 provides that sheriffs shall receive as the only compensation for their services salaries to be fixed by law, which shall be paid only out of the fees of the office actually collected, and all fees, perquisites and emoluments above the amount of their salary shall be paid into the county treasury. Section 10 of article 10 of the constitution provides that the county board shall fix the compensation of all county officers, with the amount of clerk hire and other expenses, and in all cases where fees are provided for, said compensation shall be paid only out of, and shall in no instance exceed, the fees actually collected, and all fees by them received in excess of their said compensation shall be paid into the county treasury. Sections 51 and 52 of chapter 53 (Hurd's Stat. 1903, p. 968,) makes it the duty of the sheriff to report all fees and expenses, in detail, on the first days of June and December each year, and provides for the disposition of the balance in his hands and the auditing of his books by the county board. Section 19 of chapter 53 (Hurd's Stat. 1903, p. 957,) fixes the fees of sheriffs for summoning each juror, in counties of the first class, at fifty cents, together with five cents mileage each way.

The above are the sections of the law in effect at the time appellee was appointed as special bailiff. The duly

elected and acting sheriff of Carroll county was subject to the above provisions of the law. His salary had no doubt been fixed by the county board, together with his allowance for deputy hire and other necessary expenses of his office. He had no right to the fees of his office. They did not belong to him individually or officially. They merely constituted a fund out of which he had a right to deduct his salary and pay the expenses of his office, which had been previously determined by the county board. The balance of the fees, if any, belong to the county, and it was his duty to pay them over to the county treasurer, and they then became available for other county expenses. *People v. Foster*, 133 Ill. 496; *County of LaSalle v. Milligan*, 143 id. 321.

At the time of the trial of the criminal case in the circuit court out of which this litigation grew, the sheriff, for some reason unimportant here to state, was disqualified to summons a jury. Section 13 of chapter 78 (Hurd's Stat. 1903, p. 1145,) provides that when the regular panel of jurors shall be exhausted, the court may direct the sheriff to summons a sufficient number of persons to fill the panel for the pending trial, but upon objection of either party to the cause to the sheriff summoning the persons to fill the panel the court shall appoint a special bailiff to summons such jurors. The appellee was selected by the court for this purpose. It will be observed that the statute is silent as to who this person thus selected shall be, except that the same person shall not be appointed more than once at any term of court. He may be a constable, or a person holding some other office, or a private citizen, provided the court thinks he is a proper person to perform the duty. The mere fact that appellee was a duly elected, qualified and acting constable of his township at the time of his appointment makes no difference, either in the duties to be performed by him or the compensation to be paid. Section 41 of chapter 53 (Hurd's Stat. 1903, p. 966,) provides that a constable shall receive \$2.50 per day for each day's attendance in the circuit court, to be

paid out of the county treasury. But this section refers to the usual and customary duties of a constable while acting as a deputy sheriff or bailiff. But appellee was not a deputy sheriff or bailiff in a usually accepted meaning of the term. The sheriff was disqualified and could not act, and the appellee was appointed to act in his stead. Persons refusing to obey his summons would be liable for punishment for contempt the same as if they disobeyed the summons of the sheriff. Appellee was, however, in no sense under the control or dominion of the sheriff. He was clothed with discretion as to whom he should summons, and was under orders from no one, unless it was the court.

Appellee thus occupying the position of the sheriff, the question arises as to the amount of his fees. The statute is silent as to any compensation for this work; but can it be said that he would be entitled to the fees provided by law to the sheriff for summoning jurors? We think not. These fees did not belong to the sheriff. They merely constituted a fund out of which his salary, together with the other expenses of his office, might be paid, and the balance, if any, turned over to the county treasurer,—and this only upon the theory that the fees were actually paid, otherwise they would only constitute a part of the earnings of the sheriff's office. If the sheriff himself was not entitled to the fees as his individual property, we do not see how it can be argued that appellee was entitled to them. He would certainly be entitled to no greater rights or privileges than the sheriff himself, especially in the absence of statutory provisions.

Upon the trial in the circuit court the court instructed the jury that if they believed, from the evidence, that the plaintiff was appointed by the circuit court of Carroll county as a special bailiff to serve fifty persons to act as jurors in said court, and that he acted as such bailiff and under the authority of said appointment served persons to act as jurors in said court, in that case he was entitled to recover from the county of Carroll the sum of fifty cents for each person

served, together with five cents mileage each way. Acting upon this instruction the jury returned a verdict for \$50.30 against the county. The instruction of the court and the judgment entered upon the verdict were both clearly wrong, and were not founded upon any principle of law which has been called to our attention or which we know of, and the judgment as rendered will have to be reversed and the cause remanded for a new trial.

As the case will have to be tried again and the same question arise for determination, we will pass upon the proper compensation of the appellee, so there may be no further controversy over the matter. The statute makes provision for the appointment of a special bailiff but in no place defines what his compensation shall be. The court undoubtedly can not be so obstructed by this omission as to delay its business or clog its wheels. It has summary powers to do those things which are necessary to properly administer justice. One of these summary powers is to supply any slight defect or omission which may be necessary. At the same time, the people of the county are interested to the extent, at least, that an exorbitant or unjust claim shall not be allowed. The court had authority to appoint appellee. It also had power to fix his compensation at such a just and reasonable amount as would indemnify him for his time actually employed and his necessary expenses in traveling over the county to perform his duties. This allowance should be made upon a showing of the character of the work done and the reasonable compensation therefor.

The judgments of the circuit court and of the Appellate Court will be reversed and the cause remanded for further proceedings in accordance with the views above expressed.

Reversed and remanded.

THE NEW YORK LIFE INSURANCE COMPANY

v.

CHARLES W. RILLING.

Opinion filed December 20, 1905.

EVIDENCE—*what admissible as tending to show abandonment of contract.* Where one appointed agent of an insurance company for the special purpose of soliciting life insurance from a certain person resigns his agency after the company has declined the risk applied for, it is competent, in an action by him for commissions on a policy subsequently issued to such person on the solicitation of another agent, for the defendant to show that after the plaintiff resigned his agency he attempted to obtain a policy of insurance for the same person in another company.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. LOCKWOOD HONORE, Judge, presiding.

EDWARD O'BRYAN, WILLIAM N. MARSHALL, and RUFUS S. SIMMONS, for appellant.

NEWMAN, NORTHRUP, LEVINSON & BECKER, and C. E. CLEVELAND, for appellee.

Mr. JUSTICE HAND delivered the opinion of the court:

This was an action of assumpsit commenced in the circuit court of Cook county by the appellee, against the appellant, to recover certain commissions which he claimed were due him, as a solicitor for insurance, from the appellant. The appellee recovered a judgment in the trial court for the sum of \$5684.10, which judgment, after a *remittitur* of \$2966.60 had been entered in the Appellate Court, was affirmed by that court, and a further appeal has been prosecuted to this court.

It appears from the evidence that the appellee was in the employ of the Mutual Life Insurance Company of New York as a solicitor for life insurance in the city of Chicago;

that he solicited one George P. Braun, who resided in Chicago, and obtained from him an application to said Mutual Life for \$100,000 insurance upon his life; that the Mutual Life declined the risk, whereupon appellee sought through Mr. Pearman, who was the Chicago agent of the New York Life Insurance Company, to place said insurance in said New York Life, and on the 16th day of July, 1902, the appellee, for the purpose of enabling him to obtain the commissions on said insurance should the New York Life insure Braun, was appointed agent for the New York Life. On the next day, through the appellee, Braun applied to the New York Life for \$100,000 insurance. The company did not accept the risk for that amount but offered to issue Braun a policy for \$10,000. Its counter-proposition was not satisfactory to appellee, and he declined to submit the proposition to Braun. Nothing more seems to have been done by appellee with reference to the Braun insurance until October 11, 1902, when he executed and delivered to the appellant the following instrument in writing:

"CHICAGO, ILL., October 11, 1902.

"New York Life Ins. Co., New York, N. Y.

"GENTLEMEN—Referring to the agreement that has been in existence between your company and myself, I wish to avail myself of the clause which gives me the privilege of terminating such agreement. Please have same take effect immediately. Please construe this as my resignation.

Yours truly,

C. W. RILLING."

On the 21st of July, 1903, Braun, through an agent of the New York Life in Chicago named Nichols, again made application to the appellant for \$200,000 insurance on his life, which was accepted by the company, and four policies aggregating that amount were issued to Braun, for which he paid to the company \$10,870 in cash as the first annual premium. Appellee claimed the New York Life secured the Braun insurance through his efforts, and he was entitled to the commissions provided to be paid him in his contract with the company bearing date July 16, 1902. The appellant

claimed that contract was terminated by appellee's resignation bearing date October 11, 1902, and that the Braun insurance was obtained some ten months after the termination of said agency, through the efforts of Nichols, and was a different kind of insurance from that applied for by Braun to the company through appellee and which had been rejected. The question, therefore, whether the appellee abandoned his efforts to insure Braun in the New York Life and his rights under said contract at the time he resigned as agent of said company and waived thereby any claim against the company based on the application made to the company by Braun through his efforts, became an important question on the trial. It, in fact, was one of the main grounds of defense relied upon by appellant. The appellee and appellant both understood appellee was only appointed as agent of the New York Life for the purpose of handling the Braun insurance. There was a conflict in the evidence as to what was said at the time appellee resigned as agent of the New York Life. Appellee testified, at the time he resigned he stated to Mr. Pearman he would not relinquish his rights to the Braun claim, and that Pearman said to him his resignation would not affect his claim for commissions on that insurance, and that as soon as the chief medical examiner of the company came to Chicago he would notify appellee, and appellee should bring Braun to the New York Life for examination. Mr. Pearman, and his assistant of the Chicago office, Mr. Greenwood, both testified that at the time appellee resigned he said he would do nothing more with reference to placing with the New York Life the Braun insurance, and that he made no reservations with reference to commissions on the Braun insurance.

The court, upon the trial, instructed the jury, if they should find, from the evidence, "that the letter of Rilling dated October 11, 1902, and the transactions and mutual understanding of the parties in connection with its signing and delivery, constituted an abandonment by Rilling of all

rights on the part of Rilling which had in the past or might in the future accrue to him by reason of the Braun insurance matter, then you will find the issues for the defendant."

The appellant called Braun as a witness, and offered to prove by him that after October 11, 1902, the date of Rilling's resignation, the appellee presented Braun to the Equitable Life, and that Braun through his efforts applied to said insurance company for \$100,000 insurance upon his life and submitted to a medical examination with a view to obtain such insurance from said Equitable Life. This evidence the court declined to admit. In this we are of the opinion the court committed reversible error. The appellee was appointed agent of the New York Life for a special purpose. According to the theory of the appellant he endeavored to effect that purpose by obtaining insurance in said company upon the life of Braun for \$100,000. The company declined to accept that proposition and made a counter one to issue upon Braun's life \$10,000 of insurance. The appellee declined to present to Braun that proposition, and thereupon abandoned the attempt to effect insurance upon the life of Braun in the New York Life and all his rights under his appointment as agent. If appellee, soon after his resignation as agent of the appellant, attempted to effect insurance upon the life of Braun in an insurance company other than appellant's, such fact, we think, would be wholly inconsistent with the view that he was then endeavoring to effect insurance upon the life of Braun in appellant's company and considered the contract as to Braun still in force, but would be in entire harmony with the view he abandoned the attempt to effect said insurance in appellant's company and had canceled his appointment as agent of said company and released all his rights to commissions by virtue of said appointment. The testimony of Braun, had it been admitted, would therefore have tended to corroborate the witnesses of appellant whose testimony tended to show such an abandonment, and to support the defense by appellant that appellee,

at the time he resigned as agent, severed his connection with the company and waived his right to commissions under said contract, and should have been admitted.

The appellant has urged other grounds of reversal. The questions thus presented are not likely to occur on another trial, and as the case must be reversed for the reasons indicated we have not deemed it necessary to consider those questions.

The judgments of the Appellate and circuit courts will be reversed and the cause remanded to the circuit court for a new trial.

Reversed and remanded.

CHARLES H. SMYTHE *et al.*

v.

THE PEOPLE *ex rel.* John J. Hanberg, County Treasurer.

Opinion filed December 20, 1905.

1. SPECIAL ASSESSMENTS—*delinquent list and notice must agree.* Upon application for judgment of sale the delinquent list stands as a declaration and the notice as process, and they must agree.

2. SAME—*what constitutes a fatal variance between delinquent list and notice.* Description of property in the delinquent list as being located in "Sherman & Krutz's Roseland Park addition to Pullman" and the notice as being in "Herman & Krutz's Roseland Park addition to Pullman" is fatally variant when questioned on special appearance, even though the evidence shows there is only one addition in Pullman of the name set out in the delinquent list and no addition of the name set out in the notice.

APPEAL from the County Court of Cook county; the Hon. ORRIN N. CARTER, Judge, presiding.

TAYLOR & MARTIN, for appellant.

ROBERT REDFIELD, and FRANK JOHNSTON, Jr., (JAMES H. LEWIS, Corporation Counsel, of counsel,) for appellee.

Mr. JUSTICE HAND delivered the opinion of the court:

This was an application for judgment and order of sale against the lands of appellants in the county court of Cook county to satisfy the first installment of a special assessment levied for the construction of a system of sewers in the city of Chicago known as the West One Hundred and Thirteenth street system. The appellants appeared specially and filed objections on the ground that there was a fatal variance between the notice for judgment and order of sale and the delinquent list, and pointed out in their objections that the property was described in the notice as being located in "Herman & Krutz's Roseland Park addition to Pullman," whereas it was described in the delinquent list as being located in "Sherman & Krutz's Roseland Park addition to Pullman." Appellee introduced evidence showing that there was only one "Sherman & Krutz's Roseland Park addition to Pullman" and no "Herman & Krutz's Roseland Park addition to Pullman," whereupon the court overruled the objections and rendered judgment and entered an order of sale against the lands of appellants, to reverse which judgment and order of sale the appellants have prosecuted this appeal.

The statute (3 Starr & Curt. Stat.—2d ed.—chap. 120, par. 184, p. 3464,) provides that the county collector shall give notice for judgment and sale for delinquent taxes and special assessments by publication, which publication notice shall contain a list of the delinquent lands and lots upon which the taxes or special assessments remain due and unpaid, the names of the owners, if known, the total amount due thereon, and the year or years for which the same are due, and that he will apply to the county court for a judgment and order of sale against said lands and lots for said taxes and special assessments, with interest and costs. This section of the statute is mandatory and must be complied with strictly, otherwise the county court does not obtain jurisdiction to proceed. Cooley, in his work on Taxation, (1st ed.) on page 335 says, that whether the notice required is to be

made by publication or by posting, "it must be complied with strictly. This is one of the most important of all the safeguards which has been deemed necessary to protect the interests of the parties taxed; and nothing can be a substitute for it or excuse the failure to give it." Blackwell, in his work on Tax Titles, (4th ed. p. 249,) says, that where "the statute declares what the contents of the advertisement shall be, each fact required by the statute must appear in the advertisement or it will be void; thus, the time and place of sale, a description of the lands to be sold, the amount of tax due, the name of the owner, * * * the year for which the tax was due, a recital of the purpose for which the tax was levied, and such other facts as the particular statute under which the notice is given may have rendered essential. Any omission in these respects, or variance between the contents of the notice and the facts of the case, will invalidate the proceedings."

This court (*McChesney v. People*, 178 Ill. 542; *Gage v. People*, 188 id. 92;) has held that a material variance between the notice and the delinquent list is fatal to a valid judgment and order of sale. The variance between the notice and delinquent list in the *McChesney* case was, that the name of the owner appeared in the notice as "Chesney" and in the delinquent list as "A. B. McChesney;" and the variance in the *Gage* case was, that the notice and delinquent list described differently the special assessment warrants, both as to date and the improvement for which the special assessment was to be levied. The delinquent list stands as a declaration and the notice as process, and they must agree. (*Mann v. People*, 102 Ill. 346.) The appellee sought to correct the defect by showing that there was no "Herman & Krutz's Roseland Park addition to Pullman," but that there was a "Sherman & Krutz's Roseland Park addition to Pullman," and reliance is placed upon a line of cases which hold that if a description is of such a character that a competent surveyor with reasonable certainty, either with or without

extrinsic evidence, can identify the property, the tax levy will be sustained. (*Law v. People*, 80 Ill. 268; *Otis v. People*, 196 id. 542.) Those cases are not in point. There the sole question raised was whether the property had been sufficiently described in a delinquent list or in a tax deed, while here the question is, did the court have jurisdiction to render judgment against appellants' property and to order it sold to satisfy a delinquent special assessment? We think it clear, under the authority of the *McChesney* and *Gage* cases, there was a material variance between the notice and the delinquent list, and that the county court erred in not sustaining the objections of appellants to the application for judgment and order of sale.

The judgment of the county court will be reversed and the cause remanded to that court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

THE CHICAGO HEIGHTS LUMBER COMPANY

v.

DAVID MILLER.

Opinion filed December 20, 1905.

STATUTE OF FRAUDS—*verbal acceptance of written request to pay debt of third person is within the statute.* Where a person who is not indebted to another and has no funds of such other in his hands verbally accepts the latter's written request to pay his debt, pays part of the amount by check, agrees verbally to pay the balance later and retains the written order in his possession, the promise is nevertheless within the Statute of Frauds and no action can be maintained thereon.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. M. F. TULEY, Judge, presiding.

In this cause the Appellate Court for the First District reversed the judgment of the circuit court of Cook county, which was against Miller, without remanding the cause, on the ground that neither the declaration nor the evidence shows a cause of action against the defendant. Miller appealed, and the following accurate statement of the facts in the case was made by the Appellate Court:

"This is an appeal from a judgment of the circuit court of Cook county in favor of appellee (Chicago Heights Lumber Company) and against appellant, (David Miller,) impleaded with Isadore Miller. The declaration avers and the proof shows that on August 10, 1901, William Frink drew an order on Miller Bros. for \$682.81 in favor of appellee, in terms as follows:

"CHICAGO HEIGHTS, ILL., August 10, 1901.
 "Mr. Wm. Frink—Miller Job.
 In account with Chicago Heights Lumber Company (Incorporated),
 Dealer in Lumber, Lath, Shingles, Lime, etc.
 Corner Sixteenth Street and East End Avenue.
 August 10.—To mdse.....\$711.47
 Less material returned..... 28.66
\$682.81

CHICAGO HEIGHTS, ILL., August 10, 1901.
 "Miller Bros.—Please pay to the order of Chicago Heights
 Lumber Co. six hundred eighty-two 81/100 dollars.

"Yours truly,

WM. FRINK."

"Frink delivered the order to appellee and appellee presented it to appellant, who, on behalf of Miller Bros., gave appellee the check of Miller Bros. for \$400 thereon and promised orally to pay the balance of the order in a few weeks, retaining the order in his possession.

"Miller Bros., defendants, pleaded the general issue, and subsequently, by leave of court, filed two additional pleas of the Statute of Frauds, averring that the promises mentioned in the declaration were special promises to answer for the debt of Frink, and that no memorandum or note thereof in

writing, signed by the defendants, or either of them, was made. To these pleas the court sustained a demurrer.

"On the trial the defendants, at the close of plaintiff's case, moved to strike out the plaintiff's evidence, on the ground that the contract came within the Statute of Frauds. This motion was denied. A motion to instruct the jury to find for the defendants was also denied. Thereupon defendants called David Miller to the stand and offered to prove by him that Frink had contracted to erect a building for appellant and had defaulted in the performance of his contract, but the evidence was rejected for want of proper pleas.

"At the close of the evidence the defendants requested the court to give a number of instructions, to the effect that unless it appeared from the evidence that at the time of the alleged acceptance of the order the defendants had in their hands a fund belonging to the drawer, out of which to pay the order, the plaintiff could not recover. The court refused to give any of these instructions, and instructed the jury to return a verdict for the plaintiff for \$308.13. After overruling a motion for a new trial and a motion in arrest of judgment the court entered judgment on the verdict. Errors are assigned upon the ruling on the demurrer to appellant's additional pleas, receiving and excluding evidence and the giving and refusing of instructions."

The Appellate Court incorporated in its judgment the following finding of facts: "The court finds that the acceptance sued on in this case was an oral acceptance of an order, and that there was no fund in the hands of appellant, the acceptor, out of which to pay the order."

The Chicago Heights Lumber Company obtained a certificate of importance from the Appellate Court and brings the record to this court by appeal.

ROSENTHAL, KURZ & HIRSCHL, for appellant.

WILLIAM H. JOHNSON, and ROBERT W. MILLAR, for appellee.

Mr. JUSTICE SCOTT delivered the opinion of the court:

Miller Bros. held no fund belonging to Frink and were not indebted to him. If Frink, under these circumstances, had orally requested Miller Bros. to pay his debt to Chicago Heights Lumber Company, and Miller Bros. had verbally promised the company to do so, the promise would have been within the Statute of Frauds. Does the fact that Frink's request to Miller Bros. to pay his debt was in writing and that the written request was left with appellee when he paid a part of the debt and verbally agreed to pay the remainder, make a material difference? We think not. In either event Miller Bros. could recover from Frink any amount paid in pursuance of his request. The only difference is, that in one instance the evidence of Frink's request lies in parol while in the other it is in writing. In either case the promise to pay Frink's debt is verbal and the Statute of Frauds presents a complete defense.

The only case to which our attention has been called, where, upon the oral acceptance of such an order, the writing itself was left with the acceptor, is that of *Louisville, etc. Railway Co. v. Caldwell*, 98 Ind. 245. The views there expressed by the court of last resort of the State of Indiana are consonant with the conclusion reached above.

If the written request of Frink be regarded as a bill of exchange the result would not be different, as the verbal acceptance by the drawee of a bill of exchange, who holds no funds of the drawer, is no more than a parol promise to answer for the debt of another. *Browne on Frauds*, 174; 2 Rob. Pr. 152; *Quinn v. Handford*, 1 Hill, 84; *Pike v. Irwin*, 1 Sandf. 14; *Manly v. Grogan*, 105 Mass. 445; *Plummer v. Lyman*, 49 Me. 229; *Wakefield v. Greenhood*, 29 Cal. 600; *Walton v. Mandeville*, 56 Iowa, 597.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

THE BOARD OF EDUCATION OF THE CITY OF CHICAGO
v.THE PEOPLE *ex rel.* Commissioners of Lincoln Park.*Opinion filed December 20, 1905.*

1. SPECIAL ASSESSMENTS—*when school property is subject to special assessments.* School property not a part of school section 16 nor acquired with funds derived from that source is subject to special assessment, whether the assessment is levied by the city or a park board having authority to levy the same. (*City of Chicago v. City of Chicago*, 207 Ill. 37, adhered to.)

2. SAME—a judgment cannot be attacked on *mandamus* except for jurisdiction. If property is subject to special assessment and the court had jurisdiction to enter a judgment of confirmation, the judgment cannot be collaterally attacked in a proceeding by *mandamus* to compel payment of the amount due under the several installments of the assessment.

APPEAL from the Circuit Court of Cook county; the Hon. LOCKWOOD HONORE, Judge, presiding.

This is a petition for *mandamus*, filed on February 1, 1905, in the circuit court of Cook county by the People upon the relation of the commissioners of Lincoln Park, against the board of education of the city of Chicago for a writ of *mandamus* to be directed to the said board, commanding it to certify in its next annual budget or estimate, to the proper officers of the city of Chicago, for sufficient funds to provide for the payment of \$3684.71, the amount of money alleged to be due the relators on January 30, 1905, by reason of the failure of the appellant to pay the five installments of special assessment warrant No. 196,257, for the improvement of Diversey avenue boulevard in Chicago, from Clark street to the Chicago river, and the five installments of special assessment warrant No. 203,949, for the electric lighting of said boulevard, as said assessments were levied against eight lots of twenty-five feet frontage each, abutting upon Diversey boulevard and owned and occupied by the appellant for a public school building and playground.

The appellant, the Board of Education of the City of Chicago, filed a demurrer to the petition. This demurrer was overruled, and the appellant elected to stand by its said demurrer, whereupon an order was entered directing a peremptory writ of *mandamus* to issue, commanding the board in accordance with the prayer of the petition. The present appeal is prosecuted from such order or judgment.

The petition, after reciting that the appellee, the commissioners of Lincoln Park, was a corporation created under an act of the legislature, and after reciting that the board of education was created by an act of the legislature, etc., alleges that the appellee, petitioner herein, being the commissioners of Lincoln Park, under the powers conferred upon it by the legislature, and with the consent of the corporate authorities of the towns within which Lincoln Park is situated, is empowered to levy special assessments for the purpose of making local improvements on the various boulevards and parkways within its jurisdiction; that, on January 7, 1899, it filed with the consent of the corporate authorities of the town of Lake View and under the name of said town for the use of the appellee a petition in the Superior Court of Cook county in cause No. 196,257 for the improvement of Diversey avenue boulevard from Clark street to the Chicago river; that a report or assessment roll was prepared and filed in the said cause by the commissioners, appointed for that purpose by the court, and the court, by judgment entered of record on September 20, 1899, confirmed said assessment roll in all particulars; that, on January 15, 1900, appellee filed, with the consent of the corporate authorities of the town of Lake View, and in the name of said town for the use of said commissioners in the Superior Court of Cook county in cause No. 203,949, a certain other petition for a local improvement, consisting of an installment of an electric lighting system on said Diversey avenue boulevard; that a report or assessment roll was prepared and filed in said cause by the commissioners appointed for that purpose by the court, and

said assessment roll was confirmed by the judgment of said court in all particulars on May 5, 1900; that said property, consisting of eight lots, was used by the board of education for a public school building and playgrounds and abuts upon Diversey avenue boulevard; that the said boulevard was selected and taken in accordance with the statutes by said park commissioners, as a boulevard, several years before the levying of the said assessments; that all things, required by the statute for the levying of said assessments, were performed in accordance with such requirements; that due notice was given to the board of education of the filing of said petitions; that no objection thereto was ever made or filed by the board of education in either of said causes; that, upon the confirmation of said assessments, the appellee caused the boulevard to be improved in accordance with the ordinance and specifications adopted for that purpose, and such improvements have been for a long space of time fully completed and opened for use, and said public school building, and the board of education, derive a great and lasting benefit from said improvements; that warrants were duly issued by the clerk of the Superior Court, directed to the county collector, authorizing him to collect the said special assessment on warrant No. 196,257, and that there were due certain amounts upon the first, second, third, fourth and fifth installments, with interest, etc.; that upon the falling due of the installments on warrant No. 203,949, the appellant refused to pay the collector the amounts levied against said property for said assessment, and that certain amounts are due for the first, second, third and fourth installments, with interest; that the fifth installment of said last named warrant will not fall due until January 5, 1905; that the total amount due, exclusive of interest, including the said fifth installment, is \$3122.64; that a deficiency existed in both of said special assessments for the improvement of said Diversey boulevard, after its completion, for a large amount; that the premises, upon which said special assessments were levied,

are described in the books of the board of education as "School tax fund property," "being no part of section 16 or acquired in any way from funds derived from that source;" that the board, appellant herein, has never paid said special assessments, levied against its property, although requested to do so, and refuses to pay the same; that the board is liable for special assessments levied on its property and should pay the same out of funds, obtained by said board in the manner provided by law; that annually it is the duty of the board of education to submit to the proper officer of the city of Chicago its estimate of the amount of funds needed for the ensuing year, stating in said estimate the items for which said funds are needed, but that said board, in violation of its duty, has refused, and still refuses to include in said estimate any items or sums necessary for the payment of said special assessments; that there was due on warrant No. 196,257 on January 30, 1905, including interest and costs, as in the judgment of confirmation provided, the sum of \$3091.42, and upon warrant No. 203,949 on the same date, including interest and costs, as in said judgment provided, the sum of \$593.29, making a total then due to appellee of \$3684.71.

JAMES MAHER, and ANGUS ROY SHANNON, for appellant.

FRANK HAMLIN, (BYRON BOYDEN, of counsel,) for appellee.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

The brief of the appellant in this case seems to be an effort to induce this court to overrule the decision, made by it in the case of *City of Chicago, for use of Schools v. City of Chicago*, 207 Ill. 37. After a careful consideration of the argument of counsel for appellant, we see no reason for retreating from the views expressed in the decision in that

case. Substantially, the only question there involved, which is also the only question here involved, is whether or not the property assessed, being school property, and not a part of any section 16, or acquired in any way with funds derived from that source, is subject to special assessment. We held, in the case referred to, that such school property was subject to special assessment.

The principal points, made by the appellant in the case at bar, are that the owner of school property in the city of Chicago is the State of Illinois; that to confirm a special assessment against any of said property involves a suit at law in reality against the State, though it is not nominally made a party of record; that the law prohibits the suing of the State; that the board of education of the city of Chicago is a governmental State agency, and no authority of law exists for suing the same; that all school property within the jurisdiction of the board must under the constitution be used for public school purposes, and that to permit it to be subject to special assessment for boulevard and park improvements would be to allow its use for other than such purposes; that the charge and control of school property within the limits of the city of Chicago rest with the board of education, and to permit the same to be subject to special assessment for park and boulevard purposes would necessitate the taking of the charge and control of the same out of the hands of the board; that all property of every description under the charge and control of the board must be used for public school purposes, and there is no authority of law for levying any tax under any law of this State, applicable to the public school system within the city of Chicago, the proceeds of which can be expended for purposes other than public school purposes, and to permit this special assessment of public school property would involve the use of public school moneys for other than public school purposes; and that, therefore, for these reasons, public school property is exempt from the special assessments levied in this proceeding.

Substantially, all the questions thus presented for our consideration were determined in the case of *City of Chicago v. City of Chicago*, *supra*, against the contentions of the appellant, and we see no reason for a re-argument or re-discussion of the same. The only difference between the case at bar and the case already decided is the fact that, in the case referred to, the city of Chicago levied the special assessment there involved, while, in the case at bar, the special assessments have been levied by the commissioners of Lincoln Park. The principles, announced in the decided case, are the same as those here involved, and are as well applicable to these assessments, levied by the Lincoln Park commissioners, as to the other assessments levied by the city of Chicago.

The commissioners of Lincoln Park have power to levy assessments by and with the consent of the corporate authorities of the town, within which said park is situated, (3 Starr & Curt. Ann. Stat.—2d ed.—2861; *Jones v. Town of Lake View*, 151 Ill. 663; *Halsey v. Town of Lake View*, 188 id. 540.) The Lincoln Park commissioners have power conferred upon them by the legislature of the State to levy special assessments for the purpose of making local improvements on the various boulevards and parkways in their jurisdiction with the consent of the corporate authorities of the towns, within which the park is situated. And it is so alleged in the petition. In *City of Chicago v. City of Chicago*, *supra*, we said (p. 45): "It is also insisted by appellant that the payment of this special assessment out of the school funds would be a diverting of said funds from the object for which they were created. We do not see how that position can be maintained. A special assessment may be levied for the purpose of paving streets, putting down sidewalks, putting in curbing, or for sewer purposes, all of which are, in theory, for the benefit of the property abutting on the line of the improvement. Undeniably all of these improvements are of great benefit if not of actual necessity, to a public school, and from the most of them no property derives more benefit than

does that of the board of education. They are as necessary to the practical use of the property as the furnishing of heat, light and air. Special assessment for such improvements is but a method of applying the funds of the school district for the benefit of its schools, and is legal and proper."

We are unable to say that the improvement of Diversey avenue boulevard by the grading, curbing, filling, paving and lighting of the same is not a benefit to the public school property here involved, which abuts upon said boulevard. It is true that the boulevard may be wider and better paved and better lighted than an ordinary street, but it cannot be said that the only object of the assessments here involved is to beautify and improve the boulevard as a driveway. The improvements in question in addition to the beautifying of the boulevard as a driveway, benefit the property assessed for practical use. The legislature delegated to the park commissioners the power to pave and improve the streets, taken by them to be used as boulevards in connection with the park system, in the same manner as the city of Chicago is empowered to improve its streets. The boulevard here in question was so taken by the commissioners of Lincoln Park, and under these proceedings was improved by curbing, filling, grading, paving and lighting, in the same manner as other streets are improved.

In *City of Chicago v. City of Chicago, supra*, we held that such a suit as this was not against the State of Illinois, using the following language in that case (p. 44): "We do not think this is a suit against the people of the State of Illinois, nor do the lands belong to the people of the State of Illinois. The title thereto is in the city of Chicago in trust for the use of the schools in that city, and any interest, which the people may have in the lots, is confined to the people of the city of Chicago, rather than to the whole State of Illinois. Our statute expressly provides that boards of education may sue and be sued, and while it is contended that there is no such express provision with reference to the board

of education of the city of Chicago, yet we think the power to sue and be sued may be implied from the act, and that the suit in question is in reality a suit against said board of education, rather than against the people of the State of Illinois." In the case referred to, it was also distinctly held that exemption from taxation does not exempt from special assessments; and that school property, not being a part of section 16 of the township nor derived therefrom, is subject to special assessment, whether occupied for school purposes, vacant, or occupied by buildings from which the school receives rent; and that the payment of a special assessment against school property for improvements of benefit to the property is a proper method of applying the funds of a school district for the benefit of its schools.

It is to be noted that this is a petition for *mandamus* against the board of education to compel it to pay the judgments of confirmation already rendered. The proceeding is, therefore, a collateral one, and the validity of the judgments of confirmation cannot be here questioned, unless it be shown that the court rendering them was without jurisdiction. Inasmuch as the school property was subject to special assessment in the manner already stated, the court, which rendered the judgment of confirmation, had jurisdiction. It is alleged in the petition, that no objection, such as is here urged, was made or filed by the board of education in either of the special assessment proceedings hereinbefore referred to. This allegation is admitted by the demurrer to be true. As the board did not make such objections in the original assessment proceeding, it is too late to do so in this collateral proceeding.

For the reasons above stated, we are of the opinion that the court below decided correctly in sustaining the demurrer to the petition.

Accordingly, the judgment of the circuit court of Cook county is affirmed.

Judgment affirmed.

THE ILLINOIS, IOWA AND MINNESOTA RAILWAY COMPANY

v.

MARTIN RING.

Opinion filed December 20, 1905.

1. EMINENT DOMAIN—*when amount of a condemnation verdict will stand.* An allowance of compensation and damages by the jury in a condemnation case, if within the range of conflicting testimony, will not be disturbed on appeal, where the jury viewed the premises and there is nothing in the record showing that the jury was prejudiced or that the amount is grossly wrong.

2. SAME—*danger of fire from passing engines may be an element of damage.* A witness testifying in a proceeding to condemn farm land for a railway right of way may base his opinion as to damages partly upon the element of danger from fire caused by sparks from locomotives.

3. APPEALS AND ERRORS—*errors not assigned cannot be reviewed.* Alleged error in overruling a demurrer to a cross-petition in condemnation cannot be reviewed, where the action of the court in overruling the demurrer is not assigned as error.

APPEAL from the County Court of Will county; the Hon. A. W. DESELM, Judge, presiding.

This was a condemnation proceeding begun in the county court of Will county by the filing of a petition by the appellant company, against the appellee, to condemn, under the statute, a strip of land one hundred feet in width across the eighty-acre farm owned by appellee. The strip of land as located by appellant runs lengthwise and diagonally across the eighty acres of land by beginning on the north line of the tract where the west line of the said right of way is one hundred and ninety-six feet from the north-west corner of the said tract, then running partly on a curve to the south-east corner of the tract, so that the east line of the right of way is thirty-nine and one-half feet from the said south-east corner, dividing the eighty acres, lengthwise, into two irregular, triangular-shaped pieces of land, one of which contains about forty-five and one-half acres and the other

twenty-eight acres. The cause was tried before the court and a jury. The jury made a personal inspection of the premises, and returned a verdict finding the sum of \$1189.50 as just compensation for the six and one-half acres of land taken and finding the sum of \$3197.25 as damages to the remainder of the land adjacent to the strip taken. Judgment was rendered in accordance with the verdict, and this appeal is prosecuted to reverse that judgment.

EDDY, HALEY & WETTEN, and J. L. O'DONNELL, (C. H. PEGLER, of counsel,) for appellant.

C. W. BROWN, COLL McNAUGHTON, and P. SHUTTS, for appellee.

Mr. JUSTICE RICKS delivered the opinion of the court:

The principal contention of appellant is that the damages are excessive. It will be seen from the statement of the case that the amount of damages allowed for the land taken amounted to \$183 per acre for the six and one-half acres. The evidence discloses that the land was worth from \$120 to \$200 per acre, some of the witnesses testifying that the land was worth from \$200 to \$300 per acre. The amount of the damages was within the range of the evidence, which was all that was necessary. And as to the damages to the land not taken, the jury fixed the price at \$43.50 per acre. Eleven witnesses testified for appellee as to the damages to the remainder of the land, the lowest being \$55 and the highest \$80 per acre, the balance of the witnesses ranging in amounts between the two. The amount found by the jury to be the actual damages was less than the lowest estimate placed upon the land by any witness for appellee. We have repeatedly held that allowances for damages by a jury in a condemnation proceeding, if within the range of the evidence, will not be disturbed, on appeal, where the evidence is conflicting and the jury viewed the premises. (*Illinois*,

Iowa and Minnesota Railway Co. v. Humiston, 208 Ill. 100, and cases cited.) This court will not disturb the finding of the jury under such circumstances unless we can say from the record that the jury were prejudiced and unfair in reaching their conclusion or that the amount found is grossly excessive for the land taken and damaged. No such condition exists in this record. The verdict of the jury is in accord with the evidence in every respect, and it would be unwise for this court to undertake, as an abstract proposition of law, to determine what the amount of damages would be upon a condemnation proceeding, without having an opportunity to see and inspect the premises. All we have to go by is the evidence as it appears in the record, and if we find that the judgment is reasonable and sustained by the evidence it is our duty to sustain the verdict of the jury.

It is next insisted that it was error in permitting the witness Baker to testify as to the element of damages that might arise from fire that might be emitted from the engines in use on said road. Other witnesses testified to substantially the same as did the witness Baker, but no objection was made or exception taken to their testimony. The witness testified that one of the things he took into consideration as to the determination of the market value of the land was the danger from fire. We think that the evidence was proper, as it is competent for witnesses to give their opinion as to the state of facts upon which they base their opinion, and we see no good reason why the probabilities of fire from passing trains should not be shown by the evidence to be an element of damages that may be taken into consideration. *Chicago, Paducah and Memphis Railroad Co. v. Atterbury*, 156 Ill. 281.

It is next urged that counsel for appellee, in addressing the jury, made improper remarks. But upon objection by counsel for appellant the remarks objected to were either at once withdrawn or modified, and we are unable to see how the jury could have been prejudiced by the remarks.

It is next urged that a demurrer which was filed to the appellee's cross-petition should have been sustained. The demurrer was overruled but the ruling of the court is not assigned as error, and appellant abode the ruling of the court on the demurrer. Under this condition of the record we are not at liberty to decide this question, as only errors that are assigned can be reviewed by this court.

After a careful examination of the record we find no error which would justify us in reversing the judgment. The judgment of the county court of Will county is accordingly affirmed.

Judgment affirmed.

THE PEOPLE *ex rel.* Lewis C. Price, County Treasurer,

v.

THE WISCONSIN CENTRAL RAILROAD COMPANY.

Opinion filed December 20, 1905.

1. TAXES—*county board must state purpose of tax levy.* A tax levy by the county board of seventy-five cents on each \$100 of taxable property according to its assessed valuation, but which fails to specify the particular purposes for which the tax was levied, is invalid.

2. SAME—*power of legislature to enact curative laws respecting taxes.* In the absence of any constitutional prohibition the legislature may validate, by a curative act, any proceedings which they might have authorized in advance, including cases where the power to levy taxes has failed of proper execution through the carelessness of officers, but it cannot, by retrospective legislation, cure a want of authority to levy the tax.

3. CONSTITUTIONAL LAW—*constitution does not require county board to specify the purposes of tax.* Section 8 of article 9 of the constitution, providing that "county authorities shall never assess taxes, the aggregate of which shall exceed seventy-five cents per \$100 valuation," etc., does not, by the use of the word "aggregate," manifest an intent that the county board shall specify the particular purposes for which the taxes are levied.

4. SAME—*act of 1905, curing prior tax levies by county boards, is valid.* The act of 1905, (Laws of 1905, p. 359,) to cure tax

levies by county boards which were defective for omitting to state the particular purposes for which the tax was levied, is within the power of the legislature, interferes with no vested rights of taxpayers and renders the taxes in question legal and valid. (*C., B. & Q. R. R. Co. v. People*, 213 Ill. 458, explained.)

APPEAL from the County Court of Lake county; the Hon. D. L. JONES, Judge, presiding.

LESLIE P. HANNA, State's Attorney, (BENJAMIN H. MILLER, of counsel,) for appellant.

CHARLES WHITNEY, for appellee.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

At the June term, 1905, the county court of Lake county refused the application of the county collector of said county for a judgment against the property of appellee for a county tax levied on said property, and from that judgment this appeal was prosecuted.

At the September session, 1904, the county board attempted to levy a county tax of seventy-five cents on each \$100 of taxable property according to its assessed valuation, and did not specify the particular purposes for which the tax was levied. Such a levy was not authorized by the statute, and the tax was vitiated by the failure to comply with the law. (*Cincinnati, Indianapolis and Western Railway Co. v. People*, 213 Ill. 197; *Chicago, Burlington and Quincy Railroad Co. v. People*, id. 458.) On February 28, 1905, the legislature passed an act for the purpose of curing the defect in levies which existed in this and other like cases. (Laws of 1905, p. 359.) That act was in force from and after its passage, and the only question in this case is whether it cured the defect. If it was within the power of the legislature to pass the act, the defect was thereby cured and the tax validated.

There is no prohibition in our constitution against the passage of retroactive statutes, and they are not invalid if they do not impair vested rights or come in conflict with some provision of the constitution. The general rule is, that where there is no constitutional prohibition the legislature may validate, by a curative act, any proceedings which they might have authorized in advance. (8 Cyc. 1083; 26 Am. & Eng. Ency. of Law,—2d ed.—609.) Cases where the power to levy taxes has failed of proper execution through the carelessness of officers or other cause come within that rule. (Cooley's Const. Lim.—4th ed.—462; Cooley on Taxation, 229.) But while curative acts may heal irregularities they cannot cure the want of authority to act at all, and the legislature cannot, by retrospective legislation, confirm what it could not originally have authorized. On that ground it is contended by appellee that the curative act of 1905 is invalid. It is urged that the legislature could not have authorized such a levy as was made because it would be in conflict with section 8 of article 9 of the constitution, which provides: "County authorities shall never assess taxes, the aggregate of which shall exceed seventy-five cents per \$100 valuation, except for the payment of indebtedness existing at the adoption of this constitution, unless authorized by a vote of the people of the county." The argument is based on the use of the word "aggregate" as showing an intent that the county authorities shall specify the particular purposes to which the money, when collected, shall be appropriated, and that the aggregate shall not exceed the rate specified. We are not prepared to say that the construction contended for should be given to the constitution, but are of the opinion that the provision was intended merely as a limitation upon the power of county authorities to levy taxes.

The next question is whether the curative act interferes with or destroys any constitutional right of the tax-payer. It is the right of the tax-payer to have an opportunity to be heard before a tax shall be finally adjudged against him,

and no tax can be valid without an opportunity for such a hearing. Therefore it was decided in *Marsh v. Chesnut*, 14 Ill. 223, that the legislature could not cure by subsequent legislation the failure of an assessor to complete the assessment and return it to a particular place on or before a certain day. The provision for such a return was to enable the taxpayer to inspect the assessment and to give him time and opportunity to make application to the county commissioners' court for correction of the assessment. The curative act deprived him of an opportunity to appeal and a hearing, and was void for that reason. The same rule was applied on the same ground in *Billings v. Detten*, 15 Ill. 218; and in *Conway v. Cable*, 37 Ill. 82, it was held that the legislature could not, by retrospective enactment, make an invalid tax proceeding valid and thereby divest an individual of his vested rights. It was there held that a citizen might allow his real estate to pass to a sale relying upon the want of compliance with the law authorizing the sale, and that his rights thereby acquired could not be affected by subsequent legislation. On the other hand, in *Cowgill v. Long*, 15 Ill. 202, the court held that although it was essential to the validity of a school tax that it should be certified to the county clerk before the first of July, the legislature had power to pass a special act declaring that a tax voted on the 20th of July and the act of certifying the tax to the county clerk should be legal and valid and effectual in the law. No vested right was interfered with, and it was considered that the legislature had the right to remedy the defect while the tax remained uncollected. In the case of *McVeagh v. City of Chicago*, 49 Ill. 318, where a tax on bank shares was not properly assessed by reason of a defective law under which it was attempted, the court decided that the legislature had power to pass a special law to cure the omission. It is within the power of the legislature to change the mode for the collection of taxes at any time before they are paid, discharged or otherwise released. (*Hosmer v. People*, 96 Ill. 58.) If the

legislature could have provided for the levy of county taxes in the manner in which this tax was levied and no constitutional right of the tax-payer was invaded, the curative act would be effective to remedy the defect. The legislature did not choose to change the plan for levying county taxes, which has been regarded as a wise one for the protection of tax-payers. No change was made in the method of levying taxes for any subsequent year, and the rule for the future remains precisely the same as before the passage of the act of 1905. County boards were not invested with power to levy county taxes without determining the amount needed for each purpose included in the levy, and the act was only intended to validate taxes previously levied where county officials had failed, through ignorance, to specify the purposes of the tax. As we think that the legislature might have authorized a levy in this manner and no vested right of the tax-payer was interfered with, the curative act had the effect to render the tax legal and valid.

It was said in *Chicago, Burlington and Quincy Railroad Co. v. People*, *supra*, that the failure to comply with the statutory requirement was not a mere irregularity, but a fatal omission, which vitiated the tax, and it is argued that the tax was therefore void and could not be given vitality by a subsequent act. Section 191 of the Revenue act is curative and prospective, and provides that in tax proceedings no tax shall be considered illegal on account of errors or informalities in the proceedings not affecting the substantial justice of the tax. What was said with reference to the tax in the case referred to related to the question whether it was within the prospective curative provisions of that section. The defect in that case and in this one did not come within the curative provisions of that section, but it does not follow that the defect was not cured by the retrospective act of 1905.

The judgment of the county court is reversed and the cause remanded.

Reversed and remanded.

W. SCOTT MARSHALL

v.

THE PEOPLE *ex rel.* Samuel J. Smith, County Treasurer.*Opinion filed December 20, 1905.*

1. SPECIAL TAXATION—*demand for payment of warrant need not be personal.* Demand for the payment of a special tax warrant issued against the property of a non-resident owner need not be personal, and it is sufficient if made by registered letter.

2. SAME—*general appearance waives defects in notice.* Alleged defects of description in the delinquent list and in the publication and certificate thereof are waived where the property owner appears and objects to the entry of judgment.

3. SAME—*publication of sidewalk ordinance is sufficient notice to property owner.* Unless the ordinance itself provides for a notice to be given to property owners to build the sidewalk, publication of the ordinance, passed under the Sidewalk act of 1875, is all the notice to which the property owners are entitled.

4. SAME—*when warrant is sufficient authority for making a demand.* A special tax warrant, in so far as it purports to authorize the street commissioner to make the amount therein called for from the goods and chattels of the property owner, is void, but is sufficient authority for making demand.

5. SAME—*burden is on objector to show that ordinance is unreasonable.* City authorities are vested with broad discretion in the matter of making local improvements, and the burden is on an objector to show that an improvement ordinance is unreasonable.

6. SAME—*clerk's report to collector need not be under seal of city.* The city clerk's report of delinquency of a special sidewalk tax to the collector is not required to be under the seal of the city.

7. SAME—*what does not constitute a different improvement.* That the completed limestone sidewalk measures longitudinally 39.8 feet instead of 40 feet, as called for in the ordinance, and that the stone is thought by some witnesses too soft, does not make the improvement a different one from the one prescribed by the ordinance.

APPEAL from the County Court of Marion county; the Hon. CHARLES H. HOLT, Judge, presiding.

T. E. MERRITT, for appellant.

J. C. SMITH, C. F. DEW, and J. J. BUNDY, for appellee.

Mr. JUSTICE RICKS delivered the opinion of the court:

The county court of Marion county rendered a judgment and order for sale against the real estate of appellant in the city of Centralia for the cost of the construction of a limestone sidewalk along his lot, and this appeal is from that judgment.

The walk was built by the city pursuant to an ordinance passed July 19, 1904, under the Sidewalk act of 1875. The property was located in the business district of Centralia, and the ordinance provided for a natural stone sidewalk of the width of ten feet on Locust street, upon the west line of appellant's lot, to begin at the south line and to run thence north and abut on the west line of said lot, a distance of forty feet. The ordinance required that three trenches should be dug,—one on each side and one in the center of the sidewalk line, thirty-eight inches below the sidewalk grade line,—and that there should be laid in each of these a brick supporting wall nine inches wide and thirty-four inches deep, and directed that the stone should be ten feet long and not to exceed five feet wide, of good, hard quality of limestone, free from soft and shaly spots. In May before the passage of the ordinance appellant was served with a written notice to build a walk such as was afterwards described in the ordinance, but did not do so. The ordinance was passed and published, and the city authorities waited about forty days after the publication of the ordinance, and no walk having been built by appellant, the city authorities built one. The cost of the walk was \$119.55. At the time the ordinance was passed there was a five-foot flagstone sidewalk along the line of the proposed new walk. The ordinance required that the walk be built within thirty days from the publication thereof, and that if the owner did not so construct it it should be built by the city under the supervision of the street commissioner and to be approved by the street commissioner and the committee on streets and alleys, and that the cost of the walk should be charged against the abutting property.

The walk was built in accordance with the ordinance and approved and accepted by the street commissioner and the committee on streets and alleys, and an itemized account of the cost of the same was made and filed with the city clerk by the street commissioner within thirty days thereafter. The city clerk then issued to the street commissioner, as directed by the ordinance, a warrant for the collection of the tax. Appellant did not reside in Centralia, but in Chicago, and demand was made upon him by sending a copy of the warrant in a registered letter, his receipt therefor being returned to the commissioner. It is urged that this demand was not sufficient, but should have been a personal one. We do not agree to this contention. It is sufficient that it be shown, and in a proper manner, that a demand was made and that the property owner either failed or refused to pay. The law does not require that an officer go from Centralia to Chicago to serve such a demand. Appellant did not pay the same, and on the 2d of January, 1905, the street commissioner returned the warrant, stating the manner in which the demand was made, and that no part of it had been paid. On January 5, 1905, the city clerk certified the property as delinquent to appellee, as county treasurer and *ex officio* collector of said county, who advertised the same as delinquent and made application for judgment at the June term of said court. Appellant appeared at that term, by his counsel, at the time fixed for application for judgment and filed eleven objections, (several of which were of a general character and went to the merits,) which were overruled and judgment and order of sale entered. Appellant excepted and moved to vacate or set aside the judgment and for a new trial, which was also overruled.

Counsel for the appellant devotes a large portion of his argument to the objections urged against the delinquent list and the publication and certificate thereof, and endeavors to point out that the property is not properly described and that it is in many other respects insufficient. It is unneces-

sary to enter into a consideration of these objections, as the appellant appeared and objected to the judgment and had all the benefit and advantage that a good notice could have given him, and in such case it is immaterial whether the notice be good or bad and complies with the law or not. *Mix v. People*, 106 Ill. 425.

It is next urged that appellant was entitled to be served with a notice to construct the walk after the passage of the ordinance, and that as the notice was served upon him before the passage of the ordinance he was never in default. The statute does not require that a city shall give to the property owner a notice to build a sidewalk where an ordinance is passed, such as the one before us, for the construction thereof. The publication of the ordinance is all the notice to which the property holder is entitled. By its publication it becomes a law of the municipality, and the owners of property affected are bound to take notice of it and act accordingly. This is true unless the ordinance itself, under which the walk is constructed, provides that a notice shall be given, in which event it is necessary that the city show that the notice required by the ordinance has been given. (*Hoover v. People*, 171 Ill. 182; *Hintze v. City of Elgin*, 186 id. 251.) The ordinance in question did not contain a provision for giving notice to the property owner, but followed the statute and required the property owner to build the sidewalk within thirty days from the publication of the ordinance, and no other or further notice was required.

It is also claimed that the warrant for the collection of the tax was void because it authorized the street commissioner, as collector, to make the amount therein called for from the goods and chattels of appellant. So much of the warrant as attempted to make it an execution was void. (*Craw v. Village of Tolono*, 96 Ill. 255.) But the street commissioner did no act under it that would raise that question, as he only made demand, and it was sufficient authority to him to make the demand though it ran as an execution.

The claim that the ordinance is void because unreasonable and oppressive is not sustained by the evidence. The location was in the business district of the city and the other walks about it were of the width of ten feet, and were so required by the extent of the use of them. This is not denied by appellant, but it is urged that as there was five feet of good stone walk there, the city should only have required an additional five feet in width to be built. It will be observed that the walk so ordered was a ten-foot walk, and it was required that the stones, which should lie crosswise on the walk, should each be ten feet in length and not to exceed five feet in width. This would make a much smoother and better walk than a walk with a seam or opening in the center and a seam formed by the cross layers of stone. In a matter of an improvement such as this a broad discretion must be confided to the city authorities, and the burden is upon the one complaining to show that the ordinance is unreasonable, and we are unable to see that such is the case, as shown by this record.

It is claimed that the report of delinquency made by the city clerk to appellee is insufficient because there is not attached thereto, under the signature of the city clerk; the seal of the city. The language of the statute with reference to this report is as follows: "Upon the failure to collect such special tax as heretofore provided in this act, it shall be the duty of said clerk, within such time as said ordinance may provide, to make report of all such special tax, in writing, to such general officer of the county as may be authorized by law to apply for judgment against and sell lands for taxes," etc. (Laws of 1875, sec. 4, p. 64.) From the reading of the above statute it is seen that the report is not required to be under the seal of the city, but that the only requirement is that it shall be in writing. We regard it as sufficient.

It is urged, lastly, that the walk as constructed is not the kind of walk called for by the ordinance. The evidence shows that the walk was built in the general manner pro-

vided for in the ordinance, with the brick walls for support of the stone, and that the stone used was Bedford limestone four inches thick and of the dimensions required by the ordinance. The particular points urged are, that after the walk was completed it showed that by actual measurement there were only thirty-nine and eight-tenths feet of the walk longitudinally, and that the ordinance called for a forty-foot walk; and further, that the stone that was used was not hard limestone, as called for by the ordinance, but appellant urges that the limestone used was soft. The record shows that the lot adjoining that of appellant already had a ten-foot walk and that the walk that was built along appellant's property was joined up to it. A mere difference of two-tenths of a foot in the length of the walk, when the space for a walk was all occupied with one, would seem to be a trivial matter and the objection highly technical,—so much so that the law would not take notice of it. Concerning the character of the stone, the witnesses agree that it is limestone but differ as to whether it is hard or soft. Some testify that it is soft and some hard, and others testify that it is soft when first put down but hardens by exposure. All testify that it is of the same character of stone as that usually used in that city for walk purposes. The objection that the improvement is not the improvement called for by the ordinance is not sustained by showing a slight variance in quality of material from that called for by the ordinance, and particularly so where the city authorities charged with that duty have approved and accepted the improvement or the material that enters into it. The fact that the stone was softer than some witnesses thought it ought to be would not characterize the walk as one different from that called for by the ordinance, when it is admitted and shown that in a general way the material called for was used and used in the manner directed.

The judgment of the county court is affirmed.

Judgment affirmed.

JOHN J. KROELL, Admr.

v.

ELIZABETH KROELL.

Opinion filed December 20, 1905.

1. APPEALS AND ERRORS—*petition to set off widow's award is not an action ex contractu.* A petition for appointment of appraisers to set off a widow's award is not a proceeding in the nature of an action *ex contractu*, and the Supreme Court has jurisdiction of an appeal from a final judgment of the Appellate Court in the case even though the amount involved is unknown at the time.

2. SAME—*when judgment of Appellate Court is final.* A judgment of the Appellate Court is final which reverses a judgment of the circuit court dismissing a petition for the appointment of appraisers to set off a widow's award upon the ground that the widow had released her rights by an ante-nuptial contract, where the Appellate Court in its opinion holds that the widow's rights were not released by the contract and remands the cause for further proceedings not inconsistent with such opinion.

3. WIDOW'S AWARD—*clements essential to the right to widow's award.* The right to a widow's award, under the statute, depends upon the marriage, the continuance of the marriage relation until death and the survivorship of the wife.

4. SAME—*when widow's award is released by contract.* A contract executed jointly between husband and wife, whereby each party releases, quit-claims and conveys to the other all interest in the property of the other, both real and personal, renouncing forever all claims, in law and equity, of curtesy, dower, homestead, survivorship or otherwise, releases the right to the widow's award, and bars the same if there are no minor children of the decedent living with the widow.

5. SAME—*when contract releasing marital rights has sufficient consideration.* Marriage of the parties to an ante-nuptial contract, coupled with the mutual covenants of the parties waiving and releasing the rights of each in the property of the other, is sufficient consideration for the contract.

6. PUBLIC POLICY—*ante-nuptial contracts are not against public policy.* Husband and wife may, by ante-nuptial contract, determine for themselves what rights they may have, respectively, in their own and in each other's property during the marriage and what shall become of the property afterwards, and such contracts are not against public policy.

7. SAME—rule against barring widow's award by contract if there is a minor child is not based on public policy. The rule that where there is a minor child of the decedent living with the widow the latter's ante-nuptial contract releasing her marital rights will not be held to bar the right to claim the widow's award is not based upon considerations of public policy, but upon the fact that a minor child is jointly interested in the award.

WRIT OF ERROR to the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Mason county; the Hon. T. N. MEHAN, Judge, presiding.

LYMAN LACEY, Jr., for plaintiff in error:

The contract in question rests upon a sufficient consideration. *Phelps v. Phelps*, 72 Ill. 545; *McGee v. McGee*, 91 id. 548; *Otis v. Spencer*, 102 id. 622; *Barth v. Lines*, 118 id. 374.

The doctrine of *ejusdem generis* is only one of many rules of construction employed to ascertain the intention of the contracting parties as expressed in the instrument sought to be construed, and is applied where it is the only method of ascertaining the meaning of the contract. If it appears from the whole instrument that the general term was not intended to apply to the special terms preceding, it will not control in the interpretation of the contract. 17 Am. & Eng. Ency. of Law, (2d ed.) 6, 25; *In re Swigert*, 119 Ill. 83; *Shirk v. People*, 121 id. 61; *Misch v. Russell*, 136 id. 22; *Ambler v. Whipple*, 139 id. 311; *County of Union v. Usery*, 147 id. 204; *Webber v. Chicago*, 148 id. 313; *Gage v. Cameron*, 212 id. 146.

A general description following a specific enumeration of objects or things will be held to include such things that are of the same general character, kind, grade, description, nature or class as those specifically enumerated. *In re Swigert*, 119 Ill. 83; *Shirk v. People*, 121 id. 61; *Misch v. Russell*, 136 id. 22.

Ante-nuptial contracts are to be liberally construed to carry into effect the intention of the parties without regard

to the strictly technical meaning of the words used. 19 Am. & Eng. Ency. of Law, (2d ed.) 1240; *Phelps v. Phelps*, 72 Ill. 545.

The contract, in terms, is broad enough to and does include a release of the widow's award. *Brenner v. Gauch*, 85 Ill. 368; *Weaver v. Weaver*, 109 id. 225; *Edwards v. Martin*, 39 Ill. App. 145; *McMahill v. McMahon*, 113 Ill. 461; *Spencer v. Boardman*, 118 id. 553; *Cowdrey v. Hitchcock*, 103 id. 262.

HARDIN W. MASTERS, and THOMAS D. MASTERS, for defendant in error:

Section 74 of the Widow's Award act is to be construed as a public policy provision, intended for the maintenance of the widow for a designated period after the death of the husband. The right to receive the benefits flowing therefrom is not barred in the absence of specific language showing an intentional waiver. *Strawn v. Strawn*, 53 Ill. 263; *Phelps v. Phelps*, 72 id. 548; *Race v. Oldridge*, 90 id. 253; *McMahon v. McMahon*, 113 id. 167; Schouler on Executors, (3d ed.) sec. 453; *Sheldon v. Bliss*, 4 Seld. 31; *Pulling v. Durfee*, 85 Mich. 34.

Being a public policy provision, intended in its spirit for the support and comfort of the widow, nothing save an express and proper waiver is favored by the courts. *Christy v. Marmon*, 163 Ill. 227; *Taylor v. Taylor*, 144 id. 436.

In the construction of ante-nuptial agreements or marriage settlements the courts do not incline to broaden the scope of the terms therein employed nor do the courts favor the reading of waivers of peculiar rights into such contracts. The waiver must be an expressed one. *Pierce v. Pierce*, 71 N. Y. 154; 14 Am. & Eng. Ency. of Law, (1st ed.) 540.

An ante-nuptial contract must express or show adequate consideration to receive the sanction of the courts.

Under the terms of the contract nothing whatever moves from the husband to the wife. They bind themselves not to interfere with the property and rights of the other flowing

from the marriage. The language in this regard simply announces the law since the Married Woman's act. The consideration is inadequate. *Goff v. Rogers*, 71 Ind. 459.

Whilst existing marriage is a good consideration, a contemplated marriage is not. *Lloyd v. Fulton*, 91 U. S. 479.

Where there is a particular recital and general words, the general words are restricted to the particular recital. *Denn v. Wilford*, 8 D. & R. 449; *Jackson v. Stevens*, 16 Johns. 110; *Jackson v. Stackhouse*, 1 Cowd. 122; Bishop on Contracts, sec. 593; *Shirk v. People*, 121 Ill. 61; *People v. Railroad Co.* 119 id. 83.

General words are limited always to that thing or those things which were specially in contemplation of the parties at the time when the release was given. Pollock on Principles of Contracts, secs. 436-442; *Feldman v. Morrison*, 1 Ill. App. 460; *Gaddis v. Richland County*, 92 Ill. 124; *Clark v. Saskarth*, 8 Taunt. 431; *McDade v. People*, 29 Mich. 50; *Commonwealth v. Killian*, 109 Mass. 346.

The contract released nothing but dower. Homestead rights cannot be released except in the mode provided by the statute. Such rights as the contract released were rights and interest accruing *inter vivos* by virtue of the marriage, and not peculiar public policy provisions of the statute which accrue by operation of law upon the death of the husband. *Zachmann v. Zachmann*, 201 Ill. 393.

In all marriage settlement cases passed upon by our courts where the award was barred, either the expressions "widow's portion," "widow's award," "all rights in my estate," or "in lieu of all rights at my death," appeared, or else they were will cases where the widow accepted under the will, and an allowance would have defeated the provisions of the will. *Brenner v. Gauch*, 85 Ill. 368; *McMahill v. McMahon*, 105 id. 596; *Jordan v. Clark*, 81 id. 465; *Phelps v. Phelps*, 72 id. 545; *Spencer v. Boardman*, 118 id. 556; *Weaver v. Weaver*, 109 id. 226; *Mayrand v. Mayrand*, 194 id. 47; *Christy v. Marmon*, 163 id. 225.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

Defendant in error, Elizabeth Kroell, filed in the county court of Mason county her petition for the appointment of appraisers to set off to her a widow's award out of the estate of her deceased husband, John Kroell, Sr. She annexed to her petition a copy of an ante-nuptial contract between herself and her said husband, which the county court held to be a good defense. The petition was dismissed and the petitioner appealed to the circuit court, where, by stipulation, all charges of fraud were eliminated and the cause was heard upon the question of law as to the sufficiency of the contract to release the award. The circuit court came to the same conclusion as the county court and dismissed the petition, and the petitioner appealed to the Appellate Court for the Third District. That court held that the petitioner did not, by the ante-nuptial contract, release her right to a widow's award, and reversed the judgment and remanded the cause for further proceedings not inconsistent with the opinion then filed. From the judgment of the Appellate Court the case has been brought here by writ of error sued out by John J. Kroell, administrator.

The ante-nuptial contract was executed on April 8, 1886, under the hands and seals of the parties and was acknowledged by them. Each of the parties had been married before. Each one had adult children of the former marriage, and each was possessed of property, both real and personal. The contract recited that they contemplated a marriage with each other, and being each seized in their own right of personal property and real estate, and being desirous that each one should hold his or her undivided property then in possession or which might thereafter be acquired, separate and apart, without molestation or interference of the other, the same as though no marriage relation existed, they agreed that each of the parties should have full and separate control

of his or her property, both real and personal, without molestation from the other. The remainder of the contract was as follows:

"It is agreed by and between the said parties, that each one shall have full control of their own separate property, both real and personal, to lease, sell and dispose of the same and receive all moneys, rents, issues and profits thereof, without molestation from the other; that each one shall pay their own debts now contracted or that may be hereafter contracted, and in no case shall the one be held for the debts of the other in any manner whatever. Now, therefore, in consideration of the above agreements, and of the sum of one dollar to me in hand paid, I, the said John Kroell, Sr., do hereby release, convey and quit-claim to the said Elizabeth Crawford all interest I may acquire in and to all her property, both real, personal and mixed, now in possession or that she may hereafter acquire, renouncing forever all claims, in law and in equity, of courtesy, dower, homestead, supervisorship or otherwise. And I, the said Elizabeth Crawford, in consideration of the above covenants and agreements, and of one dollar to me in hand paid, do hereby release, convey and quit-claim to said John Kroell, Sr., all interest I may acquire, by virtue of such marriage, in and to all his property, both real, personal and mixed, now in his possession or that he may hereafter acquire, renouncing forever all claim, in law, equity or courtesy, dower, homestead, supervisorship or otherwise."

The parties to the contract were married on May 11, 1886, and on September 9, 1903, the husband, John Kroell, Sr., died intestate. No children were born of the marriage.

A motion has been made by defendant in error to dismiss the writ of error on the ground that the court has no jurisdiction because the judgment of the Appellate Court is not final and the sum of \$1000, exclusive of costs, is not involved. The only question in the case in the circuit court was whether the facts stated in the petition showed the peti-

tioner entitled to the widow's award. The court decided that she was not, but the Appellate Court reversed the judgment and remanded the cause to the circuit court for further proceedings not inconsistent with the views expressed in the opinion filed. In that opinion it was held that the petitioner had not released her right to the widow's award by executing the contract, and that she was entitled to have the appraisers appointed to set off such award. Upon the re-instatement of the case in the circuit court the only order that court could make, not inconsistent with the opinion of the Appellate Court, would be to appoint the appraisers and have the award set off. In such a case this court has jurisdiction to review the judgment on appeal or error, and the amount in controversy does not determine the question of jurisdiction. What the amount of the award made by the appraisers would be is, of course, unknown, but the proceeding is not in the nature of an action *ex contractu*. The motion to dismiss is denied.

By the contract each party released, conveyed and quit-claimed to the other all interest in the property of the other, both real and personal, "renouncing forever all claims, in law and in equity, of courtesy, dower, homestead, supervisorship or otherwise," and it is contended by counsel for defendant in error that these terms do not include the widow's award. That position cannot be sustained. The contract was evidently drawn by some person not familiar with legal terms, and "curtesy" was meant by the word "courtesy," and "survivorship" by "supervisorship." The right to a widow's award, under the statute, depends upon marriage, the continuance of the marriage relation until death, and the survivorship of the wife. The contract included all rights acquired by either one of the parties to it who should outlive the other, in the property or estate of the other, and clearly embraced the widow's award. The contract is sweeping in its terms, and includes every interest that the petitioner acquired in or to the property of her husband by virtue of the marriage and every interest which she would become entitled

to upon his death in case she survived him. The widow's award is of the same character and belongs to the same legal classification as dower and homestead, which are specifically mentioned, and it would be a wholly forced and unnatural construction of the contract that would exclude the widow's award. It can make no difference whether the interest of the husband in the property or estate of his deceased wife is of the same kind and amount as the interest of the wife in the estate of her deceased husband. Whatever interest either one acquired in the property or estate of the other was released by the contract.

It is further contended that the contract does not rest upon a sufficient consideration, and that an intended marriage is not such a consideration. The parties were married, and marriage itself has always been regarded as a sufficient consideration to support a marriage settlement. (*Otis v. Spencer*, 102 Ill. 622; 19 Am. & Eng. Ency. of Law,—2d ed.—1233.) It was the only consideration in the antenuptial contract passed upon in the case of *Dunlop v. Lamb*, 183 Ill. 319. But in this case there was another consideration, which was the mutual covenants of the parties to waive their rights in the property of each other and the release of such rights. Each party conveyed and quit-claimed to the other all interest to be acquired, by virtue of the marriage, in the property, real and personal, of the other, and the mutual covenants were a good consideration. *McGee v. McGee*, 91 Ill. 548; *Barth v. Lines*, 118 id. 374.

The remainder of the argument in support of the judgment of the Appellate Court is based upon grounds of supposed public policy, and it is insisted that upon such grounds the court ought to construe the contract in favor of the widow and against the heirs and hold that a widow's award has not been relinquished. It is true that in the case of *Phelps v. Phelps*, 72 Ill. 545, the justice delivering the opinion indulged in observations on the subject of public policy, but the grounds of the decision were that a child was born

of the marriage and was living with the widow at the time of filing the petition; that a widow's award is for the joint benefit of the widow and the minor children of the decedent; that the specific allowance being as much for the benefit of the children as the widow, she has no power to deprive the children of such benefit by an ante-nuptial contract, and that to effect the purpose of the statute it is necessary that the widow shall share in the benefit of the award. If the wife had no power to release the widow's award because it was for the benefit of herself and the minor child, and the benefit of the provision of the statute could only be secured to the child by setting off the award to the mother as the natural guardian, the question of public policy was of no importance. If there was a want of power that fact was conclusive in the case, and the attempted release would have been ineffective no matter what public policy was. It is clear that the public concern that widows shall not become charges upon the public charitable institutions of the State was not the ground of the decision, inasmuch as the court said that if there had been no child or children of the decedent residing with the widow after his death a very different question would have been presented, and that in such a case the award would have been for her sole use and might be treated as a personal right which she could relinquish. It was distinctly held that the effect of the ante-nuptial contract was to bar her dower and prevent her taking any portion of the estate as heir under the statute, and so far as considerations of public policy that widows shall not become public charges is concerned, the same rule would apply to dower and inheritance as to the award. The court afterward defined the exact scope of that decision in *Weaver v. Weaver*, 109 Ill. 225, where the court said: "The only thing actually decided by the *Phelps* case is, that the award of a widow having a family consisting, in part, of a minor child of the deceased is not barred by an unexecuted ante-nuptial contract." The court also said: "The result of the decisions of this court, as we

understand them, go to this extent, but no further: A widow having a family consisting, in part, of the decedent's children is entitled to the widow's award notwithstanding there is an outstanding ante-nuptial executory contract by which she has agreed to accept a certain sum of money or something else in lieu of it." The court in that case held that the children of the deceased who were members of the widow's family had no vested right to the award, and that when the right to an award once accrued to a widow she might exchange the specific articles of property awarded to her or release them altogether.

The law has no policy against the making of contracts, or the enforcement of them, when executed by competent parties without fraud and with full knowledge of all material facts. While the law prescribes the rights of husband and wife in the property of each other, they may nevertheless, by ante-nuptial contract, determine for themselves what rights they may respectively have in their own and in each other's property during the marriage and what shall become of such property afterward. Such contracts are not against public policy, but, on the contrary, are considered as being generally conducive to the welfare of the parties. (19 Am. & Eng. Ency. of Law,—2d ed.—1225.) In *McGee v. McGee*, *supra*, the court expressed the opinion that such contracts between persons advanced in life, especially where they had previously been married and where there were children of both marriages, among whom there might be dissension as to the property, might be entered into with propriety, and the court said: "Such agreements are forbidden by no considerations of public policy, and there can be no reason why equity will not lend its aid to compel the surviving party to abide the contract." The contract in that case is substantially the same as this one, and was evidently used as a model, to some extent, in drafting this one. In *Barth v. Lines*, *supra*, an ante-nuptial agreement was held to bar the dower of the widow and it was enforced according to its terms. In

Yarde v. Yarde, 187 Ill. 636, it was said that although the statute would have given the widow more than the ante-nuptial contract, there was no reason why her contract for less than the amount given to her by the law, which she fairly entered into, should not bind her, and she must abide by it. In the case of *Christy v. Marmon*, 163 Ill. 225, it was held that the ante-nuptial agreement did not bar the inheritance of the wife, for the reason that it only provided for a certain annual payment as dower. There was no attempt in that case to eliminate anything from the contract or to restrict or limit it in any way on account of the hostility of the law to such contracts, and it was enforced according to its terms. In the case of *Zachmann v. Zachmann*, 201 Ill. 380, the decision rested upon the fact that there was a minor child of the decedent residing with the widow, and the rule that if there were no children of the decedent living with the widow an ante-nuptial agreement would be effective to bar her award was distinctly recognized. The same rule was held to extend to the homestead right and was applied in the same way on the same grounds, and the decision that the dower was not waived was upon the ground that the consideration could not be apportioned, which reason would not apply in a case where no question of apportionment is involved. If heirs should be willing that the entire consideration should be paid for that which was lawfully released, the widow would not be entitled to dower because there could not be an apportionment.

It was not decided in the case of *Friederich v. Wombacher*, 204 Ill. 72, that an ante-nuptial contract only becomes effective when accepted by the widow after the death of her husband. In that case the husband by his will gave to his wife all that she was entitled to under the ante-nuptial contract and all his personal property in addition thereto, and it was held that she was concluded by the acceptance of the provisions of the will under the well established rule that she could not claim under the will and at the same time set

up any claim inconsistent with it. It was said that although a husband could not, against the consent of the wife, deprive her of her homestead and widow's award, he could by his will give her money or property in such a manner that she would be concluded by her election to accept it. She is not deprived of her statutory right to a widow's award without her consent where she has released such right by a valid contract. In this case all rights which petitioner acquired under the statute by virtue of her marriage with John Kroell, Sr., and surviving him as his widow, were released by the antenuptial contract. The county and circuit courts correctly decided that question.

The judgment of the Appellate Court is reversed and the judgment of the circuit court is affirmed.

Judgment reversed.

THE PEOPLE *ex rel.* Wallace Young, County Treasurer,

v.

DANIEL PRUST *et al.*

Opinion filed December 20, 1905.

1. DRAINAGE—*collector's report is not limited to taxes due for that year.* The county collector's report of delinquent drainage assessments is not limited to the year for which the report is made, but may include assessments which fell due in former years and also those due and unpaid on the 10th of March of the next year.

2. SAME—*when failure of collector's return to give year assessments were due is not fatal.* Failure of the county collector's return, the caption of which recites that it is a list of lands reported for the year 1904, to specifically state that certain drainage assessments were due in March of 1905 is not fatal, where the drainage treasurer's report, on which the collector's report was based, expressly states that the assessments were due March 1, 1905; and the omission may be corrected on application for sale.

3. SAME—*collector's return need not show what assessment is for nor to whom payable.* Where the report of the treasurer of a

drainage district identifies the delinquent assessments as a special drainage tax for a certain district it is not essential that the county collector's return show what the assessments are for nor to whom they are payable when collected.

4. SAME—*affidavit of drainage treasurer to report of delinquent assessments is not jurisdictional.* The affidavit of the treasurer of a drainage district to his report to the county collector of delinquent assessments is not jurisdictional, and it is not error for the court, on application for judgment of sale, to permit an affidavit to be filed curing the defect.

APPEAL from the County Court of Clark county; the Hon. EVERETT CONNELLY, Judge, presiding.

JAMES W. CRAIG, Jr., (EDWARD C. CRAIG, of counsel,) for appellant.

H. R. SNAVELY, and GOLDEN, SCHOLFIELD & SCHOLFIELD, for appellees.

Mr. JUSTICE WILKIN delivered the opinion of the court:

At the June term, 1905, of the county court of Clark county, the county collector made application for judgment and order of sale against certain lands of appellees for delinquent drainage district assessments due drainage district No. 1 of the town of York, in that county. Appellees filed objections to the application, and upon a hearing the court sustained each and all of them and entered judgment in favor of appellees and against appellant. From this judgment appellant has perfected his appeal to this court, and assigns as errors the sustaining of each and every one of said objections.

Section 106 of chapter 42 (Hurd's Stat. 1903, p. 747,) provides that it shall be the duty of the treasurer of each and every drainage district to make out a certified list of all delinquent lands upon which taxes remain unpaid, and on or before March 10 of each year he shall file said list with the

county collector of the county in which such lands shall lie. The return above provided for was made by the treasurer of district No. 1 of the town of York, the material parts of which are as follows: "To Wallace Young, county collector: I, Harry B. Dulaney, treasurer of drainage district No. 1 of York township, of the county of Clark and State of Illinois, do hereby certify that the following is a correct list of the delinquent lands upon which the assessment due March 1, 1905, with interest at six per cent from that date, remains unpaid, to-wit:" Then followed a list of owners, together with the description of each piece of land and the amount due upon each.

Section 106 of chapter 42, *supra*, also provides that after this list is filed with the county collector it shall be his duty to transfer the amounts therein specified to the tax books in his hands, setting down therein opposite the respective tracts of land, in proper columns prepared for that purpose, the amount due upon each tract or lot, and there shall be like proceedings for the collection of said tax as in case of State and county tax. Section 182 of chapter 120 (Hurd's Stat. 1903, p. 1539,) provides that after the first day of April the county collector shall give notice, by publication in the newspaper, of the delinquent lands returned to him, together with notice of application for sale and the date upon which the sale will begin. Section 188 of the same chapter provides that the county collector shall transcribe into a book prepared for that purpose, and known as the tax judgment sale, redemption and forfeiture record, the list of delinquent lands and lots, which shall be made out in numerical order and contain all of the information necessary to be recorded, at least five days before the commencement of the term at which application for judgment is to be made, which book shall set forth the name of the owner, the proper description of the land, the year or years for which the tax is due, the valuation on which the tax is extended, the amount of tax, costs, charges, etc.

In compliance with the three above sections the county collector, Wallace Young, on May 29, 1905, filed with the county clerk a list of delinquent lands and lots, including the lands of appellees. The caption of that list is as follows: "A list of lands and town lots reported by Wallace Young, county collector of revenue, for the year A. D. 1904, in the county of Clark and State of Illinois," etc. Then followed a list of names of owners, including appellees, together with descriptions of land, and over the columns containing the amounts were the words "Special drainage tax." In the oath of the collector attached to the list he made affidavit that the foregoing was a true and correct list of the delinquent lands and lots within the county of Clark upon which he was unable to collect the tax and special assessments.

Upon the hearing the appellant asked leave to amend the delinquent list of the treasurer of the drainage district by attaching an affidavit of said treasurer reciting that the foregoing list was the delinquent list of the lands in Clark county in said drainage district; that said list contained the lands upon which assessments were made by the drainage commissioners of said drainage district for drainage purposes and which the affiant could not collect; that said assessments were due on March 1, 1905, and drew interest at the rate of six per cent per annum from date, and that the respective amounts set opposite the respective tracts of land and charged thereto were the amounts assessed against the said tracts of land and remain due and unpaid at the time of the returning of the delinquent list, and the same had been filed with the county collector of Clark county. The court refused to allow the amendment to be made.

The above recitals are those necessary to be considered in determining the validity of objections filed by objectors.

The first objection is, that the delinquent list recites that the tax is due for the year 1904, when in fact the lands of objectors were not taken into the district until 1905 and no assessment was due and payable for the year 1904. If any

objection could be made to the petition it would be that it did not comply with the statute for the reason that the collector had failed to mention in his return any specific year for which the delinquent taxes were due. In the caption he recites that it is a list of lands and town lots reported for the year 1904, while the affidavit attached to it states that the list is for the year or years therein set forth. It does not state that the taxes are due for the year 1904, but does state that the report is made for the year 1904. This report, under the provisions of the statute, does not necessarily include only taxes for the year 1904, but may include special assessments which fell due in prior years, and also those which were due and remained unpaid on March 10 of the next year. The lands of appellees were not taken into the district until January, 1905, and the report of the treasurer expressly stated that the assessments were due March 1, 1905. The statute made it the duty of the treasurer to report these delinquent taxes to the county collector. The specific objection made by appellees is not sustained by the record, and even if it was, it was a mere informality or omission on the part of the county collector, which could have been corrected if the point had been specifically raised. *Peoria, Decatur and Evansville Railway Co. v. People*, 141 Ill. 483; *Mix v. People*, 106 id. 425.

The second and third objections are, that the return of the county collector does not show to whom the assessment is due or what the special assessment is for, so that the county collector could know in what column to place it and so the tax-payer can know what assessment he has paid. We deem it sufficient to say that no section of the statute has been called to our attention requiring this to be done. Section 106 of chapter 42 and sections 182 and 188 of chapter 120 contain nothing with reference to the omission complained of. The report of the treasurer specified that the amounts due were for special drainage tax of district No. 1, and the lands of appellees were situated in that district and in no other.

This information sufficiently informed appellees what assessment they were paying and also enabled the county collector to turn over to the proper parties the amounts derived from the same, which was all that was necessary, and appellees had no valid ground for complaint in that respect.

The fourth objection is, that the delinquent list returned to the county collector by the drainage treasurer does not show in what county or State the land is situated, so that the county collector can know what land to extend the taxes against and so the tax-payer can know what land he is paying for. An examination of the return of the treasurer will show that there is sufficient information in his report so that the lands may be definitely located. They are described in particular sections, townships and ranges. Even if the description was not proper, appellant made application to the court to amend his return so as to specifically cover the alleged omission, which the court refused to allow.

The fifth objection is, that the report of the treasurer is not sworn to. We have held in the case of *Chicago and Northwestern Railway Co. v. People*, 174 Ill. 80, that the affidavit required is not jurisdictional and that the defaulting tax-payer is not interested in the affidavit; that he may show that the tax has in fact been paid, but if he shall not do so, it does not concern him that the proper authorities have acted upon less or different evidence in that respect than might have been required. The amended affidavit offered by the appellant also cured this defect, and the court committed error in refusing to permit it to be made.

The appellee Jeff Cline also objects that certain of his lands were not in the district. The record shows that a stipulation was entered into by the parties to the effect that the lands of the objectors returned delinquent and on which this drainage tax was sought to be collected were taken into the drainage district in January, 1905, and were classified and assessed by the drainage commissioners, and that the assessment was due March 1, 1905.

From an examination of all of these objections we are convinced that they should have been overruled. It is nowhere claimed that the tax was not properly levied by the proper parties or that it had been paid, and no reason was assigned why it should not be paid. There is no objection to the substantial justice of the tax, and under the many decisions of this court appellees' objections should not have prevailed. (*St. Louis, Rock Island and Chicago Railway Co. v. People*, 147 Ill. 9; *Buck v. People*, 78 id. 560.) Section 191, chapter 120, (Hurd's Stat. 1903, p. 1541,) provides that any error or informality in the proceedings of any of the officers connected with the assessment, levying or collecting of the taxes not affecting the substantial justice of the tax itself shall not vitiate or in any manner affect the tax or the assessment thereof, and any irregularity or informality in the assessment roll or tax list, or in any proceeding connected with the assessment or levy of such tax, or any omission or defective act of any officer connected with the assessment or levy of such tax, may, in the discretion of the court, be corrected, supplied and made to conform to the law by the court or by the person from whose neglect or default the same was occasioned. If these objections were specifically made in the court below and insisted upon, the corrections could have been permitted under the above section and the objections overruled.

The county court committed reversible error in its rulings and its judgment must be reversed. The cause will be remanded, with directions to the county court to overrule each of said objections and enter a judgment and order of sale in conformity with the views herein expressed.

Reversed and remanded.

WATSON MURDOCK *et al.*

v.

SARAH M. MURDOCK.

Opinion filed December 20, 1905.

1. ANTE-NUPTIAL CONTRACTS—*rule where provision for wife is disproportionate to amount of husband's property.* If the provision for the intended wife in an ante-nuptial contract is disproportionate to the means of the intended husband, the husband and those claiming under him have the burden of proving that the intended wife, at the time she executed the contract, had full knowledge, or reasonable means of knowledge, of the nature, character and value of the intended husband's property.

2. SAME—*when provision for wife is disproportionate to husband's means.* A provision for the wife consisting of a small house in which to live and a widow's award valued at \$1350 and \$1500 in cash is disproportionate to the husband's estate, consisting of personal property valued at \$35,000, even though he had only \$10,000 worth of personal property at time the contract was made, where he also had at that time reserved a life estate in certain lands conveyed to his children, which amounted to \$4000 a year and which proved to be his most valuable asset.

3. SAME—*what does not supply proof of knowledge by wife of husband's means.* The facts that the intended husband and wife had lived near each other for many years and were well acquainted, and that the intended husband was reputed to be a man of wealth, do not supply proof of knowledge by the intended wife of the nature, character and value of the intended husband's property. (*Yarde v. Yarde*, 187 Ill. 636, distinguished.)

4. SAME—*intended wife not bound by relative's uncommunicated knowledge.* Knowledge by a son-in-law of the intended wife as to the actual financial standing of the intended husband is not binding upon the intended wife, in the absence of proof that this knowledge was communicated to her.

WRIT OF ERROR to the Appellate Court for the Third District;—heard in that court on writ of error to the Circuit Court of Douglas county; the Hon. W. C. JOHNS, Judge, presiding.

JOHN H. CHADWICK, THOMAS W. ROBERTS, ECKHART & MOORE, and P. M. MOORE, guardian *ad litem* for Oma Campbell, for plaintiffs in error.

I. A. BUCKINGHAM, and ROY F. HALL, for defendant in error.

Mr. JUSTICE HAND delivered the opinion of the court:

This was a bill in chancery filed in the circuit court of Douglas county on the 11th day of September, 1902, by Sarah M. Murdock against the heirs-at-law of John D. Murdock, deceased, to set aside an ante-nuptial contract bearing date July 25, 1892, entered into between the said Sarah M. Murdock and John D. Murdock; also certain deeds made by John D. Murdock to the plaintiffs in error, conveying to them, in fee simple, eight hundred and seventy-five acres of farm lands situated in said county, (subject to a life estate reserved therein to said John D. Murdock,) bearing date shortly prior to the marriage of the said Sarah M. Murdock and John D. Murdock, and for the assignment of dower in said lands. Answers and replications were filed, and the case was referred to the master in chancery of said county to take the proofs and report his conclusion as to the law and the facts. The master took the evidence and filed a report recommending that the bill be dismissed for want of equity. The chancellor sustained exceptions to the master's report in so far as it held the complainant was barred of her distributive share in the personal estate of the said John D. Murdock, deceased, but overruled the same as to his findings and recommendations with reference to the conveyances of the farm lands and entered a decree sustaining the deeds from John D. Murdock to the plaintiffs in error, and held that the defendant in error was not entitled to dower in said farm lands, but decreed her to be entitled to her distributive share, as widow of said John D. Murdock, in his personal estate, the same as if the said ante-nuptial agreement had not been executed,—from which decree, so far as it was adverse to their interests, the plaintiffs in error prosecuted an appeal to the Appellate Court for the Third Dis-

trict, where the decree of the circuit court was affirmed, and a writ of error has been sued out from this court to the Appellate Court to review the judgment of that court.

It appears from the evidence that on the 26th day of July, 1892, John D. Murdock and Sarah M. Bentley were married at Murdock, a small village in Douglas county, where they had both resided and been intimately acquainted with each other for many years. John D. Murdock at the time of the marriage was seventy-six years of age and was a widower and had six children,—two sons and four daughters,—all adults, and who resided in their own homes; and Sarah M. Bentley was fifty years of age, was a widow and had two children,—a son and a daughter,—both of whom were adults. John D. Murdock died intestate in the said village on February 9, 1902. At the time of the marriage Mrs. Bentley had personal property, consisting of wearing apparel and household goods, of the value of not to exceed \$200, and was possessed of a dower and homestead estate in the house and lot where she lived, which had belonged to her first husband, and which house and lot were not worth to exceed \$1000, and she had no prospects of obtaining any other property, by inheritance or otherwise. At the time of the engagement between John D. Murdock and Mrs. Bentley, which preceded their marriage some two months, Murdock owned eight hundred and seventy-five acres of farm lands situated in Douglas county, worth at least \$60 an acre, and which produced an annual rental of not less than \$4000. He also had personal property, consisting of cattle, horses, grain, farm implements, money and notes and mortgages, of at least the value of \$10,000. His sons and daughters were opposed to Murdock marrying Mrs. Bentley, and Mrs. Bentley advised Murdock to convey his farm lands to his children prior to the marriage, with a view, if possible, to reconcile said children to their marriage, and, pursuant to such advice, a few days prior to the marriage, Murdock, by separate deeds, conveyed all of said farm lands to his sons

and daughters in substantially equal portions, reserving a life estate to himself in said lands. About the time Murdock executed said deeds to his children he called upon his solicitor, Charles W. Woolverton, who resided in Tuscola, in said county, with a view to have him prepare an ante-nuptial contract between himself and Mrs. Bentley, and on the 25th of July Murdock and Mrs. Bentley went to Tuscola to execute the said agreement. There is no direct evidence in the record that the execution of an ante-nuptial agreement was considered or its terms agreed upon by and between Murdock and Mrs. Bentley until they met at the law office of Woolverton on July 25, 1892. Woolverton died in 1895, and the mouths of Woolverton and Murdock being closed by death and Mrs. Murdock being an incompetent witness, the only evidence as to what took place at the time of the execution of said ante-nuptial agreement is found in the testimony of J. W. Hamilton, who at the time of the execution of said agreement was a clerk in the law office of Woolverton. He testified that on the 25th day of July, 1892, Murdock and Mrs. Bentley came to Woolverton's office substantially together; that the agreement had been prepared by Woolverton and written out by Hamilton upon the typewriter and was ready for the signatures of the parties; that at the request of Woolverton he read over to Murdock and Mrs. Bentley, in the presence of Woolverton, the agreement, paragraph by paragraph, and that the instrument in all its parts, and its legal effect, were fully explained to the contracting parties and discussed between themselves and with Woolverton, and after a discussion as to the terms and legal effect of the instrument it was executed by the contracting parties and they left the office. At the time the agreement was signed, however, nothing was said in regard to the nature, character or value of Murdock's property, and there is no evidence in this record that Mrs. Bentley had any knowledge of the nature, character and value of Murdock's property at the time the agreement was executed or at any

time prior to her marriage to Murdock, or that Mrs. Bentley knew that Murdock, in the deeds conveying the real estate to his children, had reserved a life estate to himself, except such knowledge as she may be deemed, in law, to have had by reason of the fact that she had resided in the same village in which Murdock resided for a number of years prior to their marriage, was well acquainted with Murdock during that time and that Murdock was reputed to be a wealthy man, and that her son-in-law, with whom she was on friendly terms and who also lived in the village, was well acquainted with Murdock and was familiar with his financial standing.

The ante-nuptial agreement in question is long and need not be set out in full in this opinion. It will, however, be found incorporated in full in the Appellate Court opinion filed in this case. It, in brief, provided that John D. Murdock released all his interests in Mrs. Bentley's estate in case he survived her, in consideration that she released all her interests in his estate in case she survived him, (except that of homestead and widow's award,) in which event, in addition to said homestead and widow's award, she was to receive \$1500 in cash from his estate within sixty days from the date of his death.

The defendant in error, in support of the decree and judgment of the lower courts, makes two contentions: First, that at the time Mrs. Bentley signed said ante-nuptial agreement she did not understand its legal effect, but supposed that by the terms thereof, upon the death of Murdock, in addition to her homestead and \$1500 in cash, she would receive one-third of his personal property remaining after the payment of his debts, as a widow's award; and second, that the provision made for her in said agreement, in view of the amount of Murdock's property, was wholly inadequate for her support as his widow, and that as she was not fully informed by him of the nature, character and value of his property at the time she executed said agreement or prior to her marriage, it is not binding upon her and is not a bar

to her distributive share of the personal estate of said Murdock, and that in view of such inadequacy the burden of proof rested upon the plaintiffs in error to show that she executed said agreement with full knowledge of the character, nature and value of the property which Murdock had at the time she executed the agreement, and that said plaintiffs in error failed to sustain such burden of proof.

As to the first contention, the proof shows the agreement was read to Mrs. Bentley and fully explained to her at the time she signed it, and as she is a woman of some education and of apparent intelligence, and there is no claim she was induced to execute the agreement by fraud or circumvention, we think, if that contention was all there was in the case, she ought to be held to be bound by the terms of the agreement.

As to the second contention, as has before been said, there is no proof in this record that the defendant in error, at the time she signed the agreement or at any time prior to the marriage, was informed or had any knowledge whatever as to the nature, character or value of Murdock's personal property or that he had retained a life estate in said farm lands, unless such knowledge is to be imputed to her, as a matter of law, from the facts that she lived in the same town with and was well acquainted with her intended husband, that he was reputed to be a wealthy man, and that her son-in-law, who lived in the same village and with whom she was on friendly terms, was familiar with his financial condition. The rule in this State is well settled that a man and woman who contemplate marriage may by an antenuptial contract, if there is a full knowledge on the part of the intended wife of all that materially affects the agreement, settle their property rights in each other's estates. Yet it is held, if it appear that the provision made for the intended wife is disproportionate to the means of the intended husband, a presumption is raised in her favor that the execution of the agreement was brought about by a designed

concealment of the amount of his property by the intended husband, and that the husband, or persons claiming through him, in order to sustain the agreement, have cast upon them the burden of proof to show that the intended wife, at the time she executed the agreement, had full knowledge of the nature, character and value of the intended husband's property, or that the circumstances were such that she reasonably ought to have had such knowledge. (*Achilles v. Achilles*, 137 Ill. 589; *Taylor v. Taylor*, 144 id. 436; *Achilles v. Achilles*, 151 id. 136; *Hessick v. Hessick*, 169 id. 486; *Hudnall v. Ham*, 183 id. 486; *Yarde v. Yarde*, 187 id. 636.) In the *Taylor case*, on page 445, the court said: "Parties to an ante-nuptial contract occupy a confidential relation toward each other. (*Kline's Estate*, 64 Pa. St. 124; *Pierce v. Pierce*, 71 N. Y. 154; *Rockefeller v. Newcomb*, 57 id. 86.) While they may lawfully contract with each other where there is full knowledge of all that materially affects the contract, yet where the provision secured for the intended wife is disproportionate to the means of the intended husband it raises the presumption of designed concealment, and throws the burden upon those claiming in his right to prove that there was full knowledge on her part of all that materially affected the contract. * * * The burden here was, therefore, upon appellants to prove, by satisfactory evidence, that the appellee had knowledge of the character and extent of her intended husband's property and of the provisions and effect of this instrument, or, at all events, that the circumstances were such that she reasonably ought to have had such knowledge at the time this instrument was executed."

The foregoing language was quoted with approval in the *Achilles* and *Hessick cases*, and was said to be a correct statement of the settled law of this State. This being the law, the question then arises, was the provision made for the defendant in error by the agreement disproportionate to the estate of the intended husband at the time the agree-

ment was executed and the marriage consummated? The intended husband then owned and possessed, after the payment of all debts, at least \$10,000 worth of personal property and retained the use of all of said farm lands during his life, which would produce an annual rental of at least \$4000. He lived about ten years after his marriage, and died leaving an estate consisting of personal property valued at about \$35,000. The provision made for the wife gave her a small house in which to live, a widow's award, (which was fixed at \$1350,) and provided she was to receive \$1500 in cash within sixty days of her husband's death. Had Murdock been possessed only of the \$10,000 worth of personal property it might have been argued with some force that the amount which the defendant in error, in case she survived him, was to receive under the agreement was a reasonable provision for her support in view of the amount of his property. Said personal property did not, however, constitute all his property at the time of said marriage, but in addition thereto he possessed said life estate in the said farm lands, which, as it turned out, by reason of the length of time which he lived subsequent to the marriage, was the most valuable asset which he then owned. The said life estate must, we think, therefore be taken into consideration by the court in determining the question whether the provision made by Murdock for his intended wife was disproportionate to the amount of his estate at the time she executed said agreement. From a careful consideration of all the evidence we are of the opinion the chancellor and the Appellate Court properly held the provision made for the defendant in error was disproportionate to the amount of her intended husband's property, and that owing to the fiduciary relation which is presumed to exist between a woman and the man whom she is about to marry, the presumption obtains the defendant in error executed said agreement by reason of the fact that the nature, character and value of the husband's property was designedly concealed from her,

and properly held that the burden of proof was upon the plaintiffs in error to show that the intended wife had knowledge of the nature, character and value of Murdock's property at the time she executed said agreement.

This being true, and there being no direct proof in the record that defendant in error was advised or had knowledge of the nature, character and value of her intended husband's property, the next question to be decided is, did the facts that the intended wife lived near the intended husband and had been well acquainted with him for years, and that he was reputed to be a man of wealth, supply such proof? We are of the opinion they did not. This case, upon its facts, is very similar to the *Hessick case*. In that case, as here, the facts that the intended wife had resided near the intended husband for a number of years prior to the marriage, that they, during that time, had been well acquainted with each other and that the husband was generally reputed to be a wealthy man, were relied upon to bring knowledge home to the intended wife of the nature, character and value of his property. It was there held such facts were not sufficient to show the intended wife had such knowledge, and on page 492 it was said: "Were the circumstances surrounding the parties at the date of this marriage contract, as shown by the evidence, such as that appellee can reasonably be held to have had the requisite knowledge? We are inclined to adopt the conclusion of the court below in holding that they were not. But two facts were proved from which it can be inferred she had any information on the subject of his property, namely, that he was generally reputed to be wealthy, and that she had for years been well acquainted with and resided near him. The circumstance of his reputed wealth is entitled to but little weight as tending to prove that she knew the nature or value of his property. The reputation of persons as being rich or wealthy is too indefinite and general to charge those who deal with them with knowledge of the *kind* and *amount* of property they are possessed of. If

it be true, as a general proposition, that appellee, residing in the immediate neighborhood of Hessick, would be supposed to know the size, character and value of the farm he resided upon, she cannot, from that circumstance alone, be fairly charged with knowledge of other land, money and chattel property owned by him. Under the qualifications of the rule it is as important that she be held to knowledge of the *character* of his property as that she knew of its value, and even more so.²

We are also of the opinion the defendant in error was not bound by the knowledge possessed by her son-in-law with reference to the financial standing of Murdock unless his knowledge was communicated to her. The evidence fails to show it was, and she was not bound thereby.

The plaintiffs in error rely upon the *Yarde case*, *supra*. That case fully recognizes the law to have been correctly announced in the *Taylor*, *Achilles* and *Hessick cases*, and the proof there showed that the provision made for the intended wife, when the claim of the intended husband's children was taken into consideration, was not disproportionate to the amount of the intended husband's property. It also showed that the intended wife not only fully understood the contract, but that the nature, character and amount of the property of the intended husband was known to her at the time that she executed the agreement. That case is therefore so far different in its facts from the case at bar that it cannot be held, as is contended by the plaintiffs in error, conclusive of the questions involved in this case.

Finding no reversible error in this record the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

LOUIS P. KALISH

v.

THE CITY OF CHICAGO.

Opinion filed December 20, 1905.

1. APPEALS AND ERRORS—*effect where record contains no bill of exceptions.* In the absence of a bill of exceptions, only such errors as appear upon the face of the record proper can be considered by the Supreme Court.

2. SAME—*party cannot incorporate another party's bill of exceptions in his own by reference.* One appealing from a special assessment judgment cannot, by reference in his own bill of exceptions, incorporate therein the bill of exceptions prepared by other property owners for use on their own separate appeal.

APPEAL from the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding.

GUTHMAN & ROTHSCHILD, and JOHN S. STEVENS, for appellant.

ROBERT REDFIELD, and FRANK JOHNSTON, Jr., (EDGAR B. TOLMAN, Corporation Counsel, of counsel,) for appellee.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

This is an appeal from a judgment, entered by the Superior Court of Cook county in a proceeding begun by appellee for the purpose of widening West Randolph street in the city of Chicago from Halsted street to Sangamon street, a distance of three blocks, and levying a special assessment on the property benefited. The proceeding involved the condemnation of thirty-five feet fronting the street on each side for the distance named. Appellant, as owner of sub-lot 7 in James Ward's re-subdivision in block 39 in Carpenter's addition to Chicago, appeared and filed objections, and, having become the owner during the trial of sub-lots 8 and 9 in said re-subdivision, prosecuted the objections theretofore

filed. The property of appellant on sub-lot 7 is known as No. 260 West Randolph street, and is improved with a three-story brick building. The jury in their verdict awarded \$2021.25 as compensation for the north thirty-five feet of said lot 7 and the private alley adjoining the same, taken for the improvement, and allowed \$2264.00 for the improvements upon the premises. They assessed back \$2021.25 upon the balance of sub-lot 7 and of the private alley adjoining the same as special benefits, and assessed the sum of \$2070.00 as special benefits upon sub-lots 8 and 9 in said re-subdivision, and the private alley adjoining the same.

The commissioners in their report reported \$314,103.70 as the amount of benefits to property to be benefited by said improvement, and also reported that there would be no benefit to the public.

It is insisted by the appellant, first, that the question of public benefits should have been submitted to the jury, and should not have been determined by the court without a jury; second, that no resolution or ordinance had been passed by the city of Chicago, providing that the proposed widened portion of the street should become a market place, and that, therefore, benefits, predicated on the assumption that it would become a market place, were illegal; third, that the proposed improvement was a public and not a local improvement; fourth, that the damages allowed for improvements upon appellant's property are insufficient and contrary to the evidence; and fifth, that the assessments on appellant's property are excessive and contrary to the evidence. It is apparent that none of the objections, thus made by the appellant, are objections, which arise on the face of the record, and, therefore, they cannot be considered or reviewed by this court in the absence of a proper bill of exceptions. (*Kelly v. City of Chicago*, 148 Ill. 90; *Helmuth v. Bell*, 150 id. 263).

The only bill of exceptions, appearing in the record filed in this court by the appellant, contains only the motion of

appellant for a new trial, a recital of the overruling of said motion and an exception thereto, and the recital of an entry of judgment on the verdict and an exception thereto, and closes with the following recital: "And forasmuch as all other objections, made by the said objector last named in the trial of this cause, together with the ruling of the court thereon and the exceptions of said last named objector thereto, together with all the evidence, oral and documentary, offered, received and heard on such trial, as well as all instructions given and refused by the court therein, with the exceptions of said last named objector thereto, and all proceedings in said cause, not otherwise appearing of record, do now sufficiently and fully appear of record in and by the certain bill of exceptions of the certain objectors, Emily A. Snyder and Charles E. Berdel, signed and sealed and filed in this cause January 28, 1905, and now of record herein; the said objector, Louis P. Kalish, tenders this further bill of exceptions herein, and prays that the same may be signed and sealed by the judge of this court, pursuant to the statute in such case provided; which is done accordingly this 6th day of February, A. D. 1905."

Berdel and Snyder were defendants with the present appellant in this proceeding in the trial court. By the above recital appellant attempted, in his bill of exceptions entitled "additional bill of exceptions," to adopt as his own the bill of exceptions of Berdel and Snyder. The bill of exceptions, however, of Berdel and Snyder does not appear in the record of appellant filed on this appeal. There is nothing in this record to bring the bill of exceptions of Berdel and Snyder before this court in the case at bar, except the above recital in the additional bill of exceptions, filed by appellant and embodied in the present record.

The question then arises whether, in such a proceeding as this, one property owner, appealing from a judgment against his property, can, without embodying a separate bill of exceptions in his own record, adopt by reference the bill

of exceptions prepared by another property owner, seeking to review a judgment against his property.

Section 56 of the act in regard to local improvements provides, with reference to judgments of confirmation, as follows: "Such judgments shall have the effect of several judgments as to each tract or parcel of land assessed, and no appeal from any such judgment or writ of error shall invalidate or delay the judgments, except as to the property concerning which the appeal or writ of error is taken." (4 Starr & Curt.—Sup. ed.—p. 182). Section 95 of the act in regard to local improvements is as follows: "Appeals from final judgments or orders of any court, made in the proceedings provided for by this act, may be taken to the Supreme Court of this State, in the manner provided by law, by any of the owners or parties interested in lands taken, damaged or assessed therein, and the court may allow such an appeal to be taken jointly and upon a joint bond, or severally, and upon several bonds, as may be specified in the order allowing the same." (Ibid. pp. 201, 202). It thus appears that, in a condemnation and special assessment proceeding of this kind, the judgment as to each tract or parcel of land is a several judgment, and several and separate appeals may be taken from each judgment by each property owner. Here, appellant was not a party to the appeal taken by Berdel and Snyder, and we have held in a number of cases that "the judgment is in effect several as to the property owners, and one or more may appeal or prosecute a writ of error without affecting the judgment against the others." (*Kelly v. City of Chicago*, 148 Ill. 90; *Phelps v. City of Mattoon*, 177 id. 169; *Goldstein v. Village of Milford*, 214 id. 528).

Inasmuch as each judgment is several as to each property owner, and inasmuch as each property owner may take a separate appeal, and separate appeals have been taken in the case at bar, it follows that the trial judge did not seal and sign the bill of exceptions, prepared by Berdel and Sny-

der, for any property owners except Berdel and Snyder, and the document so signed constituted a bill of exceptions for Berdel and Snyder, and no one else. As to appellant, who did not join in the procuring and settling of that bill of exceptions, it is as to him merely an unofficial document, having no sanction of the trial judge. The appellant cannot incorporate into his bill of exceptions by reference only a transcript of the proceedings of the trial in the lower court, described as the bill of exceptions of Berdel and Snyder, which does not appear in any part of the record on the present appeal. This court has decided that a document or instrument cannot be incorporated in a bill of exceptions by a mere reference thereto. (*City of Chicago v. South Park Comrs.* 169 Ill. 387; *Meissner v. People*, 169 id. 530; *Lindgren v. Swartz*, 49 Ill. App. 488; *Hennessy v. Metzger*, 50 id. 533; *Dick v. Mullins*, 128 Ind. 365). Under the authorities thus referred to, the appellant could not incorporate the instrument, identified as the bill of exceptions of Berdel and Snyder, by reference in his own bill of exceptions, even if the bill of exceptions of Berdel and Snyder were contained in some other part of their own record than the bill of exceptions. Here, however, it does not appear in any part of appellant's own record, but must be looked for in the record of some other cause pending in this court, and therefore can not be incorporated by mere reference.

The rule is, that, where no bill of exceptions appears in the record, only such errors, as appear upon the face of the record proper, can be considered. (*Helmuth v. Bell*, 150 Ill. 263; *Mallors v. Whittier Machine Co.* 170 id. 434).

In *Frawley v. Hoverter*, 36 Minn. 379, it was said by the Supreme Court of Minnesota: "It is conceded that as to Kreider the judgment must be reversed, but no error as to the other defendants appears upon the record. They can not rely to show such error on the case and bill of exceptions, for it was not settled on their behalf, and it purports only to set forth the evidence and rulings on the trial of the

issue between the plaintiff and Kreider. The case against the other defendants could have no place in a case and bill of exceptions, proposed and procured to be settled by him alone, and in which they did not join. They could not be bound, nor as to them could the plaintiff be bound by Kreider's case and bill of exceptions."

Section 59 of the Practice act provides as follows: "If, during the progress of any trial in any civil cause, either party shall allege an exception to the opinion of the court, and reduce the same to writing, it shall be the duty of the judge to allow said exception, and sign and seal the same, and the said exception shall thereupon become a part of the record of such cause." (3 Starr & Curt. Ann. Stat.—2d ed.—p. 3065).

Inasmuch as there is no bill of exceptions, embodying the rulings of the court below and the evidence introduced on the trial, the points, urged by the appellant in favor of the reversal of the judgment in this case, are not before us, and cannot be considered. (*Frank v. City of Chicago*, 216 Ill. 587).

Accordingly, the judgment of the Superior Court of Cook county is affirmed.

Judgment affirmed.

WILLIAM SLACK

v.

WILLIAM FENIMORE COOPER *et al.*

Opinion filed December 20, 1905.

1. JUDICIAL SALES—*chancellor has a broad discretion in matter of approving foreclosure sale.* The chancellor has a broad discretion in passing upon the acts of the master and approving or disapproving his acts with reference to sales under decrees, and such discretion, unless abused, will not be interfered with by a court of review.

2. SAME—*when refusal to approve foreclosure sale is proper.* Where a sale under a foreclosure decree is made by the master to

the solicitor for the owner of the equity of redemption under the misapprehension that he was acting for complainant, there being no other persons present, but, a few minutes thereafter, accepts a greatly increased bid from complainant's representative, who in the meantime had arrived, the chancellor may refuse to approve either sale and order a re-sale to be had.

3. *SAME—right of master to make a re-sale.* Where the master, on foreclosure sale, accepts a bid for the premises under the misapprehension that the bidder represents the complainant and for that reason requires no payment of the purchase money or a deposit, he has a right, upon learning of his mistake and notifying the bidder of the facts and of his intention to re-sell the property, to again offer it for sale.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on writ of error to the Circuit Court of Cook county; the Hon. E. O. BROWN, Judge, presiding.

This is an appeal from a judgment of the Appellate Court affirming a decretal order of the circuit court of Cook county entered in said cause on the 13th day of April, 1904, setting aside a sale of the premises involved in this cause to the German Old People's Home, one of the appellees, and refusing to confirm an alleged sale thereof to the appellant, and the order of a re-sale of said premises.

The facts of the case disclose that on June 5, 1902, the German Old People's Home, a corporation organized under the laws of the State of Illinois for charitable purposes, and John W. Buehler, as trustee, filed their bill of complaint in the circuit court of Cook county against August Warnhoff and others to foreclose a trust deed in the nature of a mortgage upon certain property in Cook county. The German Old People's Home was the owner of the indebtedness secured by said trust deed. John C. Wilson was one of the parties defendant to the bill, being the owner of the equity of redemption, and was represented in the foreclosure proceedings by William Slack, appellant, who filed an answer on behalf of said Wilson, the other defendants being defaulted.

A reference was had on the bill and answer and replication to William Fenimore Cooper, one of the masters in chancery of said circuit court, and on March 10, 1904, a decree of foreclosure and sale was entered in said cause, finding due the German Old People's Home from the defendant the sum of \$8197.11, together with all costs incurred in the suit, and \$409.85 attorneys' fees, and decreeing that the premises be sold at public auction for cash to satisfy the same provided the defendants did not pay the sum found due in three days from the date of the decree, and providing for execution in case of a deficiency after sale. The master duly advertised the said premises for sale according to law and the terms of said decree. The time and place fixed for the same was one o'clock in the afternoon of April 5, 1904, at the judicial salesrooms of the Chicago Real Estate Board in Chicago. Between one o'clock sharp and five minutes after one upon said day at said place, the master, acting under apparent misapprehension that the owner of the decree was represented at said sale by appellant and that all persons interested were present, offered the premises for sale, the master, from his statements, having been confused as to the attorneys that represented the parties interested. At the time said master offered the premises for sale there was no one present at the salesroom except Wilson and his solicitor, appellant. The master, immediately after one o'clock, offered said property for sale and the appellant bid \$3000, and no other bid being received the master declared the same sold, and believing appellant to be the representative of said complainant, remarked, "That will leave you a deficiency of about \$5800." Immediately upon such announcement of the master the appellant left the salesroom without depositing or offering to deposit any cash or making any arrangements for the payment of the same. The master being under the impression that Slack represented the complainant said nothing to him about the payment of cash, it being the custom and practice of masters in chancery in Cook county when property is bid

in at a sale in a foreclosure suit by the complainant, (if such bid is not in excess of the amount due under the decree,) to credit the amount of his bid upon the amount found due him in the decree, and when the property is bid in by one other than the complainant and the decree provides a sale for cash, either to require the amount of the bid to be paid in cash as the property is struck off, or a substantial deposit made.

As appellant and Wilson were leaving the salesroom, and just as they had stepped out from the door, they were met by Henry Horner, Jr., who was the solicitor for the complainant in the foreclosure proceedings, who being unaware of what occurred in the salesroom, asked appellant and Wilson to return to said salesroom, as he, Horner, was going to bid in said property on behalf of the complainant. Appellant and Wilson refused to return. When Horner entered the salesroom the master was still on the raised platform from which the property was offered for sale, making a notation regarding the sale. Horner immediately asked the master if he was ready to offer for sale the premises, and the master thereupon informed Horner that his (Horner's) representative had just been in and bid \$3000 at said sale. Horner replied that no one had represented him and asked the master who made the bid, and was then informed that the property was bid in in the name of William Slack for \$3000. Horner then informed the master that appellant was the defendant's solicitor. The master then said to Horner that, acting under the impression that the appellant represented the complainant, he had not demanded any cash and none had been paid, and that the purported sale had been made under a misapprehension and mistake by himself as to the status of the bidder. The master being informed by Horner that appellant and Wilson had just left the salesroom, asked Horner to go out and ask them to return, which he did, and on meeting them at appellant's office, which was only a short distance, informed appellant that the master had instructed him to say that the sale would not be made for the

sum of \$3000 offered, on account of the misapprehension and because no cash had been paid, and informed them that the master would immediately proceed to receive higher and better bids for said property, and asked appellant to return to the salesroom at once, as the proceedings were to be re-opened. Appellant and Wilson refused to return to the salesroom, and Horner informed them there that he would return and bid the sum of \$7000 on behalf of complainant, and immediately returned to the salesroom, arriving there in about fifteen minutes after one o'clock, and advised the master of the conversation between himself, the appellant and Wilson. The master then announced publicly that no cash having been deposited and said purported sale having been opened and conducted under the misapprehension of the master, as aforesaid, and because of his haste in making the said alleged sale, the same would be re-opened for higher and better bids, and called for other bids upon the property. Horner, on behalf of complainant, offered the sum of \$7000, and being the highest and best bid received at that time, the premises were struck off to the complainant in said bill, the German Old People's Home, for said sum. Horner's reason, as stated by him, for not being present when the property was first offered for sale was that the watch he carried showed the time to be three minutes of one o'clock when he reached the salesroom, the clock at said salesroom registering but a few minutes after one.

The master filed his report showing the facts and reporting the sale to the complainant, and in his report made a complete statement to the chancellor as to what transpired between all the parties at the sale. Appellant filed an intervening petition, praying that the sale of the premises to complainant be disaffirmed and that the sale of the premises to himself be approved and confirmed. On the same day the master filed an answer to said petition, and the complainant in said cause also filed its answer to the intervening petition. Exceptions were filed by appellant to the master's report of

sale, and upon a hearing on April 13, 1904, upon said petition and the sworn answers thereto, the exceptions of said Slack to said master's report and the affidavits, the court found, in substance, that because of the misapprehension, mistake and error involved in said sale, all parties interested and prospective bidders did not have an equal and sufficient opportunity to bid, and also because no cash was paid or deposited upon said bid of appellant the bid of said appellant should not be accepted or considered, and that if said sale had been held in such a manner as to give all intending bidders an opportunity to bid, the premises would have brought at least \$7000. It was therefore ordered by the chancellor that both the bid of the complainant in said cause, as well as that of the appellant, be rejected and a re-sale had. An order was entered dismissing the petition of Slack for want of equity, from which order a writ of error was sued out in the Appellate Court, and this is an appeal from the judgment of the Appellate Court affirming the decretal order of the circuit court.

CHARLES K. LADD, for appellant.

HENRY HORNER, Jr., and CHARLES GOODMAN, for appellees.

Mr. JUSTICE RICKS delivered the opinion of the court:

As will be seen from the above statement of facts, the sole question presented in this case was the right of the chancellor to set aside the sale made by the master and order another sale, or whether or not the appellant was entitled to the property under his bid. In our opinion the chancellor had the right to order the re-sale of the premises, or even to have accepted the sale as made by the master and reported to the court for the \$7000. The chancellor, in such proceedings, is charged with responsibility for the decrees and orders to be made in the case, and it is his duty to make

investigations, and determine as to whether or not the sale as made by the master is regular, free from fraud or wrong and to the best interest of all parties concerned. The master is a ministerial officer for the purpose of carrying into effect the decree of the court, and his acts are binding only when approved by the court. If the chancellor finds, upon the coming in of the report of a master, that the sale as made is not to the best interest of all concerned and is inequitable, or that any fraud or misconduct has been practiced upon the master or the court or any irregularities in the proceedings, it is his duty to set aside the sale as made and order another sale of the premises. The chancellor has a broad discretion in passing upon the acts of the master and approving or disapproving his acts in reference to sales and entering its own decrees, (*Quigley v. Breckenridge*, 180 Ill. 627,) and his decree will not be disturbed by this court unless it is shown that he has abused his discretion and entered such an order or decree as would not seem equitable between the parties interested. Surely it cannot be said that the court has abused his discretion, in his actions in this case, in refusing to allow appellant to take the property in dispute, which is shown to have been sold under a misapprehension of fact and to be worth at least \$8000, for the sum of \$3000, when within fifteen minutes the master was offered \$7000, or \$4000 more than the first bid. If appellant had wanted to act fairly in reference to the sale he should have returned to the place of sale when sent for by the master and defended his actions.

No money was paid by appellant as provided for by the decree, and we think, under the conditions as here shown to exist, the master was justified in offering the premises for sale again. While it is true that mere inadequacy of price will not always justify the setting aside of a sale, yet where there is such a misunderstanding and inadequacy of price as is shown to exist in this case, certainly it could not be said that the sale made to appellant was just and equitable

as between all the parties interested. The master in his statement says that if he had not been mistaken as to the identity of appellant he would undoubtedly have compelled him to comply with the terms of the decree as to payments. As soon as he learned the identity of the purchaser and learned that he was not acting for or representing the complainant, he at once notified appellant that because of the mistake as to the person and appellant's failure to pay the purchase money or make a deposit he would re-sell the property. This was within his power. In *Dills v. Jasper*, 33 Ill. 262, in discussing a case much like the one at bar, it is said (p. 273): "In this country the master usually requires the amount of the bid to be deposited with him at the time of its acceptance or immediately thereafter, and on failure to do so the master may reject the bid and may again expose the property for sale." The record further shows that the only person against whom the deficiency decree could operate is financially irresponsible, and that the debt could only be realized, if at all, by the sale of the property.

While under some conditions the misapprehension of the master as to the bidder may not make such a difference as would warrant a chancellor in setting aside the sale, yet under the conditions as we find in this record, the property being sold to the attorney for the party owning the equity of redemption when he in fact thought he was selling to the party complainant in the decree, who had no other remedy for obtaining his money except under the sale, and only realizing \$3000 out of \$8000 worth of property on over \$8000 of indebtedness, the irregularities as shown warranted the chancellor in setting aside the sale, and there was no abuse of the discretion of the court.

The judgment of the Appellate Court will accordingly be affirmed.

Judgment affirmed.

WILLIAM HIGGINS *et al.*

v.

JOHANNA HIGGINS.

Opinion filed December 20, 1905.

1. PARTIES—*personal representative is not a necessary party to bill to assign homestead and dower.* A personal representative is not a necessary party to a bill by the widow to have homestead and dower assigned.

2. HUSBAND AND WIFE—*wife is within protection of the statute against conveyances made with intent to defraud.* A wife is within the protection of the statute against conveyances made with intent to defraud, and if the conveyance is purely voluntary it is not necessary the grantee shall participate in the intent of the grantor.

3. SAME—*effect where grantor had not selected his spouse.* If a conveyance is voluntary and without consideration and is made with the intention to defraud of her marital rights any person whom the grantor should marry, it makes no difference that he had not selected any particular person as his wife, since the fraudulent intent need not be directed against a particular person.

4. SAME—*voluntary conveyance made with intent to defraud a future wife of marital rights is void.* With respect to her marital rights the law affords the same protection to a wife as to a creditor, and a voluntary disposition of property made with specific intent to defraud a future wife of her marital rights is void, the same as though the conveyance was intended to defraud future creditors.

5. LACHES—*wife may be guilty of laches in seeking to set aside deed in fraud of marital rights.* As soon as she learns the facts a wife may, even though her husband is still living, bring suit to set aside a deed executed in fraud of her marital rights, and may therefore lose her right by long delay after she knows the material facts.

6. PLEADING—*allegations, proof and decree must correspond.* A decree granting relief upon a state of facts disclosed by the evidence but not alleged in the bill cannot be sustained where the bill was not amended to conform to the proof, even though the relief decreed is warranted by the facts proven.

APPEAL from the Circuit Court of Livingston county;
the Hon. G. W. PATTON, Judge, presiding.

A. C. NORTON, and R. B. CAMPBELL, for appellants.

E. A. SIMMONS, and R. S. McILDUFF, for appellee.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

The appellee, Johanna Higgins, was the second wife of John Higgins, and was married to him on May 17, 1887. She filed her bill in this case in the circuit court of Livingston county on March 19, 1903, for the purpose of setting aside a deed of eighty acres of land made by her husband, dated May 2, 1887, and recorded July 23, 1887, alleging that the deed was not in fact made and delivered until after her marriage, and was without consideration and in fraud of her marital rights. John Higgins and the grantees in the deed, with the husbands and wives of such of the children as were married, were defendants. The husband, John Higgins, was defaulted, and the other defendants, except Margaret Higgins, a daughter, answered, alleging that the deed was made, acknowledged and delivered on the day it was dated, and denying that it was executed to defraud the complainant of her marital rights. A replication having been filed, the cause was referred to a master in chancery to take and report the evidence and his conclusions. Before the master reported John Higgins died, and his death was suggested and leave was given to make his personal representative a defendant. A supplemental bill was filed on July 15, 1905, in which the death of John Higgins was alleged, and complainant claimed homestead and dower in the land and prayed that the same might be assigned and set off to her. The personal representative was not made a defendant, and counsel say that the complainant is herself the administratrix; but the personal representative was not a necessary party, since the dower and homestead are not subject to any rights of the administrator. Counsel for appellants say that the supplemental bill was not answered by Margaret Higgins, but the abstract filed by them shows that the bill was answered by all the defendants and that a repli-

cation to the answer was filed. The master reported that the deed was executed and delivered prior to the marriage and prior to the acquaintance of John Higgins with complainant, and he recommended the dismissal of the bill. Objections to the report were filed by the complainant, which were afterward heard as exceptions, and a decree was entered setting aside the deed as against complainant. The court found by the decree that the deed was executed at the time it bore date, prior to the marriage, but that it was executed without consideration and in contemplation of marriage with the complainant, and that it was executed and delivered for the fraudulent purpose of defrauding her of her marital rights. It was ordered that homestead and dower be assigned to her, and commissioners were appointed for that purpose. The defendants appealed from the decree.

The facts proved were, in substance, as follows: John Higgins was a widower with six children and owned a farm of eighty acres near Pontiac, which he occupied as a homestead with his children, except his son Patrick, who lived at Flanagan, about fourteen miles distant, where he kept a harness shop. On May 2, 1887, John Higgins made and acknowledged the deed in question, conveying the land to his children and reserving to himself a life estate. He showed the deed to the children who were at home and told them that he was going to Ireland; that he wanted to have things straightened up, so that in case anything should happen to him there would be nothing to worry him, and that Pat could take care of the deed. Shortly afterward he went to Flanagan and gave the deed to his son Patrick, saying that he wanted the son to take care of it and in case anything should happen to him it would protect the interest of the children in the property. He also said that he was going east and might go to Ireland. In fact, he contemplated going to New York to buy a piece of land and he did not intend to go to Ireland. Patrick took the deed and put it in his safe and paid no further attention to it. John Hig-

gins went to New York and from there went to Lowell, Massachusetts, to visit a sister of his first wife, whom he had never seen. When he arrived at Lowell he found that she lived at Chicopee Falls, Massachusetts, and went there. He was introduced to complainant by his sister-in-law and within two days thereafter married her. He was near sixty years old and she was about twenty-three and was living with her parents. He told her that he owned one hundred and sixty acres of land and owned personal property and a good home. She accepted his proposal of marriage on account of his representations and for the purpose of bettering her condition. He had owned the eighty acres, but if the deed had been made and delivered his representation was false even as to that. He only stayed at Chicopee Falls a very short time, and immediately after the marriage he and complainant came to the farm near Pontiac. About six months afterwards, difficulties having arisen between her and the children, she was informed of the deed. A daughter with whom she had had some words had gone to Flanagan, and at the suggestion of the daughter the deed had been put on record. The complainant claimed that she had been defrauded of her rights and went back to Chicopee Falls to her father and mother. The husband also left the farm and went to Toledo, but after an absence of about two years and a half complainant came back at his solicitation and on his representations that the deed was wrong and that he would have things changed and do right by her. Thereafter they lived on the farm, and it was farmed by the son William, one of the appellants, as a tenant. Four children were born to the complainant and her husband, and he seems then to have realized the injustice of his arrangement and wanted to make some arrangement so that his young children would not be left entirely destitute. He told complainant that the deed was made after he was married and dated back, and promised to take some proceedings to have it set aside. He evidently felt differently about the condition of things when

he saw the four little children of his second marriage entirely unprovided for while the grown-up children of the first marriage were to take all. He consulted an attorney with a view to having the deed set aside, but nothing was done, and complainant filed the bill, alleging, in accordance with his representations to her, that the deed was made after the marriage.

Appellee has assigned cross-errors on the finding of the court that the deed was made prior to the marriage. The testimony of the grantor, John Higgins, tended to prove that the deed was made after the marriage, but his recollection was very indistinct and his testimony appears quite unreliable. The evidence proves that the deed was made and acknowledged on the day of its date and was given to Patrick Higgins a few days afterward. There is more probability that the deed was only given to Patrick to hold in case anything should happen to the grantor on his journey. Nothing was said about putting it on record, and Patrick did not treat it as he would have treated an ordinary conveyance, by recording it. He put it in his safe and gave it no further attention until his sister came to him to have it recorded. On the other hand, the fact that a life estate was reserved to the grantor would not be consistent with the theory that the deed was only to be effective in case of his death by accident while on his journey. We think the record sustains the findings as to the execution and delivery of the deed.

The evidence justified the conclusion that although John Higgins had never met the complainant, he contemplated a second marriage at that time and the deed was made with a view to that event. The most reasonable explanation of his conduct when he went to Chicopee Falls is, that his visit to his sister-in-law was in view of marriage. She introduced him to the complainant, whom he immediately solicited in marriage, with the representations already mentioned as to his property. The marriage took place within two days, and

there is no reason to suppose that it was a case of a sudden attachment. The statement to the children that he was going to Ireland appears to have been untrue, and the explanation that he made the deed so that if anything should happen to him it would protect the interest of the children in the property does not look reasonable, in view of the fact that the deed made precisely the same disposition of the property that the law would have made if anything had happened to him. The reservation of the life estate could only have been inserted in the deed with the expectation that he would live to enjoy it, and there was no occasion whatever for making the deed giving the property to his children just as the law would have done, if it was made in view of some casualty to him on his journey. The conclusion drawn by the court is the only one that will fit with all the circumstances.

The conveyance was voluntary and without consideration, and if the intention was to defraud of her marital rights any person whom he should marry, it makes no difference that he had not yet selected the complainant as his spouse. There must be a fraudulent intent, but it need not necessarily be directed against a particular person. With respect to her marital rights the law affords the same protection to a wife as to a creditor, and a voluntary disposition of property made with the specific intent to defraud future creditors is void. (*Morrill v. Kilner*, 113 Ill. 318.) An intent to defraud by the conveyance of property may be ascertained by inference from the circumstances. (*Hughes v. Noyes*, 171 Ill. 575.) The wife is within the protection of the statute against conveyances made with intent to defraud, and if the conveyance is purely voluntary it is not necessary that the grantee shall participate in the intent of the grantor. It is as much a fraud for a man on the eve of his marriage, unknown to his wife, to make a voluntary conveyance of property to defeat the interests which she would acquire in the property by virtue of her marriage, as it is for a debtor

who contemplates contracting a debt to voluntarily dispose of his property in order to defeat the interest of future creditors. (14 Am. & Eng. Ency. of Law,—2d ed.—252.) We cannot say that the court was wrong in the conclusions of fact contained in the decree.

It is further contended that the complainant was barred by her own *laches* from obtaining relief. The circumstances were somewhat peculiar. When she first learned that the deed had been made it does not appear that she was aware of the facts which would enable her to have it set aside or of her rights in relation to it. When she came back it was upon representations of her husband that the record was wrong and he would have it corrected and do right by her. They were in possession of the property, and she was apparently resting in the belief that he would in some way fulfill his promises to her. When she obtained any further information from her husband it was to the effect that the deed had been executed after the marriage, and as she did not join in it it would be no bar to her right of dower or homestead if she should outlive her husband. Whenever she learned the facts in the case she had a right to institute a suit at once to set aside the conveyance as being in fraud of her marital rights. Although a wife cannot assert an inchoate right of dower in the lifetime of her husband and is not guilty of *laches* in failing to do so, she may set aside a deed executed in fraud of her marital rights. (*Freeman v. Hartman*, 45 Ill. 57; *Lohmeyer v. Durbin*, 213 id. 498.) She might therefore lose her right to relief by long delay in bringing suit after she knew the material facts, but we can not say in this case that she was barred by *laches*.

The tenant, William Higgins, built a house for himself on the premises, but that was not to be taken into account in the assignment of dower. Patrick sold his interest to William, and William loaned \$500 to one of his sisters and took a mortgage on her interest in the property to secure the loan. These transactions were between the grantees in the

deed, and as William lived on the place it is a fair inference that he knew of the claims made by the complainant and his father with respect to the deed. So far as the mortgage is concerned, there is nothing to show that the interest of the mortgagor will not be sufficient to secure the debt after homestead and dower shall be assigned.

The decree, however, must be reversed for the reason that the bill does not contain allegations of the facts upon which the relief was granted. It is a primary rule, always enforced and sustained by numberless decisions, that the allegations of the bill, the proof and the decree must correspond; that facts disclosed by the evidence which would warrant relief will not sustain a decree where the facts are not alleged in the bill. (*Dorn v. Geuder*, 171 Ill. 362.) The bill in this case was framed upon the theory that the deed was executed after the marriage and dated back prior to the marriage for the purpose of defrauding the complainant. It contained no allegation that it was executed on the eve of the marriage with a fraudulent intent to defraud the future wife. In such a case the court will permit the complainant to amend the bill so as to correspond with the proofs; but the bill was not amended, and the court by the decree found a different state of facts from those stated in the bill. The decree must be reversed, but, inasmuch as the reversal is not upon the merits, the parties will pay their own costs of the appeal.

The decree is reversed and the cause is remanded, with leave to the appellee to amend her bill to correspond with the proofs, and if such amendment is made the circuit court is directed to re-enter the decree heretofore entered, and the parties will pay their own costs in this court.

Reversed and remanded.

ISAAC KUHN

v.

SAMUEL EPPSTEIN *et al.**Opinion filed December 20, 1905.*

1. **SPECIFIC PERFORMANCE**—*when contract does not lack mutuality.* A contract to sell land does not lack mutuality because the vendor does not hold the legal title at the time the contract was made, where the vendor is the real owner but the naked legal title is being held by a third person as agent of the vendor and subject wholly to the latter's orders. (*Gage v. Cummings*, 209 Ill. 120, distinguished.)

2. **SAME**—*lease for term of years is an encumbrance.* A lease for a term of years constitutes an encumbrance, within the meaning of a contract to convey property free from any and all encumbrances.

3. **SAME**—*right of vendee to enforce part performance.* If the vendor is unable to convey the complete title contracted for, the vendee may, generally, elect to have the contract specifically performed so far as the vendor can perform it, and to have a deduction made from the contract price for the difference in value between the title contracted for and that conveyed.

APPEAL from the Circuit Court of Champaign county; the Hon. SOLON PHILBRICK, Judge, presiding.

Appellant, Isaac Kuhn, filed his bill in the circuit court of Champaign county against the appellees, Samuel Eppstein, William D. Eppstein, the Trevett & Mattis Banking Company and John McDonell, for the specific performance of a contract. The bill alleges that on June 7, 1904, Samuel Eppstein executed a certain contract in words and figures following:

"CHAMPAIGN, ILLINOIS, June 7, 1904.

"I hereby acknowledge receipt of \$500 as part payment on my building 41 Main street, which I sell and convey to Isaac Kuhn for \$7500, and I hereby agree to deliver to Isaac Kuhn, Champaign, Illinois, on or before July first, a clear title and deed free of any and all encumbrances whatsoever, taxes paid by me to date of delivery of abstract, on payment of balance by said Isaac Kuhn of \$7000.

SAMUEL EPPSTEIN."

The bill further alleges that upon the execution of said contract complainant paid the sum of \$500 to Samuel Eppstein, and was notified that he would place the deed for said premises in escrow in the hands of the Trevett & Mattis Banking Company, to be delivered upon payment of the purchase price; that William D. Eppstein held the naked legal title to the premises, but the equitable title was in Samuel Eppstein, and William Eppstein held the same in trust for Samuel Eppstein and had no other or further interest therein; that upon the payment of the \$500 William Eppstein executed a warranty deed for said premises to complainant and placed the same in escrow in the hands of the Trevett & Mattis Banking Company, to be delivered to complainant upon completion of the contract; that William D. Eppstein delivered to complainant an abstract of title and caused certain insurance policies to be delivered to complainant, and the complainant proceeded to expend the sum of \$900 in obtaining details, plans, surveys and drawings for remodeling said premises, together with another building adjoining the same and belonging to complainant; that on July 1, 1904, complainant tendered to the Trevett & Mattis Banking Company \$7000 and demanded the deed, and was informed by said banking company that it could only deliver said deed subject to a lease to one John B. McDonell, who claimed to hold the same for a period of three years from June 1, 1904; that thereupon complainant tendered the sum of \$7000 and demanded conveyance free from all encumbrances, which was refused by Samuel Eppstein. The bill further alleges that complainant has incurred certain liabilities in leasing said premises for business purposes, which liabilities cannot be carried out with the lease upon the premises. The prayer of the bill is that Samuel Eppstein, and John B. McDonell, the lessee, be required to interplead and settle and adjust the controversy between them; that the Trevett & Mattis Banking Company be required to bring the deed of conveyance into court, and that the amount

which should be deducted from the purchase price of said premises may be ascertained, and that this amount may be deducted from the purchase price and the deed delivered to the complainant.

Before the hearing the building upon the premises, of the value of \$5000, was destroyed by fire, and insurance to the amount of \$3500 was collected by Samuel Eppstein. A supplemental bill was filed by complainant setting up these facts, and praying that the depreciation in value of said premises be deducted from the contract price and the remainder of said premises conveyed to complainant.

William D. Eppstein and Samuel Eppstein demurred to the bill, and their demurrer was sustained by the court and the bill dismissed for want of equity. From this decree an appeal has been prosecuted to this court.

RAY, DOBBINS & RILEY, for appellant.

WILLIAM E. O'NEILL, and A. D. MULLIKEN, for appellees.

Mr. JUSTICE WILKIN delivered the opinion of the court:

The only question raised upon the appeal is as to the ruling of the circuit court in sustaining the demurrer and dismissing the bill. The ground upon which the demurrer was sustained does not appear from the record, but from the briefs and arguments of counsel it is apparent that it was sustained upon the authority of *Gage v. Cummings*, 209 Ill. 120, and for the reason that the contract was lacking in mutuality, because William D. Eppstein was not a party to it.

In the *Gage case* the contract was between Henry H. Gage and Norman P. Cummings, while a part of the legal title was in Mary B. Gage. We there held that the contract was not mutual, for the reason that Cummings could not have specifically enforced it against the owners of the real estate which Gage agreed to convey, because Gage did not

have the legal title to all of it, and therefore the contract was not mutual and Gage could not enforce it against Cummings. We also held in that case that the mere fact that Mary B. Gage, within the time limited by the contract for the conveyance, executed her deed and placed it in the hands of the trustee, to be delivered to Cummings whenever he complied with the contract, did not constitute an acceptance of the contract by her, for the reason that it was not made subject to her acceptance or approval. The case at bar presents a very material and different state of facts. There can be no doubt that a contract, to be specifically enforced by the courts, must be mutual, so that it may be enforced by either of the parties against the other, and whenever, from personal incapacity or any other cause, the contract is incapable of being enforced against one party, that party is equally incapable of enforcing it against the other. Fry on Specific Performance, sec. 286; Waterman on Specific Performance, sec. 196; 2 Beach on Modern Law of Contracts, sec. 885; *Mix v. Beach*, 46 Ill. 311; *Tryce v. Dittus*, 199 id. 189; *Gage v. Cummings*, *supra*.

Upon this demurrer the allegation of the bill must be taken as true. The allegation is, that William Eppstein, at the time of the execution of the contract, held the naked legal title to the premises but that the equitable title was in Samuel Eppstein, and William Eppstein held the naked legal title in trust for Samuel Eppstein and had no other or further interest in the premises, and that the \$500 part payment was delivered to defendants and accepted by them, and William Eppstein executed a warranty deed conveying the premises to appellant and placed the same in the hands of the bank to be delivered to appellant, and the deed thus delivered was held by the bank subject to the order and direction of Samuel Eppstein. Accepting these facts as true, William Eppstein was merely the agent of Samuel Eppstein and held the title subject to his order. If William Eppstein had refused to obey the orders of Samuel Eppstein with reference to the

property, or had refused to re-convey to him or to any other person designated by him, a court of equity, as between the two, would have had complete jurisdiction to enforce the rights of Samuel Eppstein. (*Coffin v. Argo*, 134 Ill. 276; *DeWalsh v. Braman*, 160 id. 415.) The contract was signed by the real equitable owner of the premises. It cannot be disputed that he had full power and authority to make the contract of sale, or to make any other disposition of his own property as he might see fit, without any interference from his son, William. If he had the right to make the contract his son was not a necessary party to it. The bill makes the son a party defendant, and we see no reason why the contract was not mutual and could not be enforced by either of the parties thereto, one against the other. If William Eppstein had held the legal and equitable title to any portion of the premises,—i. e., had been the actual owner thereof,—the contract, not being signed by him, would be wanting in mutuality. But that is not this case.

The contract provided that the premises should be conveyed to the appellant free from any and all encumbrances. There was a dispute as to the rights of the tenant,—whether his lease was from month to month or for a term of years. If his tenancy was for a term of years the lease was an encumbrance on the property. The bill alleged that appellant made a tender of the balance due upon the contract but demanded a deduction of the value of the lease. Appellee sought to compel him to take it subject to the lease. The bill seeks to have the parties interplead, determine their respective rights and deduct from the contract price the amount of depreciation. This the appellant had a right to demand, and the court had a right to provide for it in the decree. In the case of *Lancaster v. Roberts*, 144 Ill. 213, we said' (p. 226): "In suits by the purchaser for specific performance, where the vendor is unable to make complete title, the general rule (for it is not universal) in all such cases is, that the purchaser, if he chooses, is entitled to have the contract specific-

ally performed as far as the vendor can perform it, and to have an abatement out of the purchase money or compensation for any deficiency in the title, quantity, quality, description or other matters touching the estate." To the same effect are *Hunt v. Smith*, 139 Ill. 296, and *Bishop v. Newton*, 20 id. 175.

We are therefore of the opinion that the allegations of the bill, when taken as true, were at least sufficient, upon demurrer, to entitle appellant to the relief, and the court committed error in sustaining the demurrer and dismissing the bill. The decree will therefore be reversed and the cause remanded.

Reversed and remanded.

D. V. PURINGTON *et al.*

v.

GEORGE HINCHLIFF.

Opinion filed December 20, 1905.

1. **TRADE AND COMMERCE**—*a party unlawfully interfering with another's lawful business is liable for damages.* Any person or combination of persons who unlawfully, by direct or indirect means, obstruct or interfere with another in the conduct of his lawful business are liable in damages for loss willfully caused by such action.

2. **SAME**—*all parties to a conspiracy to injure the business of another are liable.* All parties to a conspiracy to ruin the business of another because he refuses to do some act against his will or judgment are liable for all the overt acts done pursuant to such conspiracy and for the resultant loss, whether they were active participants or not.

3. **SAME**—*when agreement not to use certain brick is illegal.* An agreement between a brick manufacturers' association, a builders' association and a bricklayers' union that they will not use, purchase or lay brick made by any person who had not subscribed to the rules of the builders' association, for the unlawful purpose of injuring the business of such persons, is illegal, and the parties thereto are liable in damages for all acts done in pursuance thereof resulting in loss to the boycotted persons.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. EDWARD P. VAIL, Judge, presiding.

This was an action on the case commenced in the circuit court of Cook county by George Hinchliff against D. V. Purington, William H. Weckler, Adam J. Weckler, Frederick LaBahn, Louis Reimer, Charles Harmes, William Schlake, P. J. Sexton, Edward T. Harland, J. C. Thompson and the Masons' and Builders' Association.

The substantial allegations of plaintiff's declaration, after various amendments, are: "That for six years prior to the committing of the grievances complained of, plaintiff was a manufacturer and dealer in bricks, and was the owner and possessed of certain lands and buildings at Hobart, Indiana, which were in use by him as such manufacturer, and which had been acquired and equipped for said business of manufacturing brick at an expenditure of \$50,000; that during said period the plaintiff was engaged in the manufacture of brick and selling the same almost exclusively in Cook county, Illinois, and was in receipt of large profits, and especially from having a market for said brick in said Cook county; that during said time the Chicago Masons' and Builders' Association was a corporation in said Cook county, and had among its members about two-thirds of all persons and firms then engaged in said county in the business of constructing brick and mason work and in purchasing and obtaining supplies of brick to be used in said county; that the membership of said corporation comprised substantially all the responsible and reliable persons or firms engaged in the business aforesaid in said Cook county; that during said period the members of said association constructed ninety-five per cent of the brick and mason work in said county, and plaintiff made sales of substantially all of the brick of his manufac-

ture, and all that could be manufactured at his said plant, to members of said association, from which he derived profits of \$10,000 per year; that the defendant J. C. Thompson is and was a member and president of said association; that during said period there was in said county a voluntary organization of individuals known as the Brick Manufacturers' Association of Chicago, comprising ninety-five per cent of the manufacturers of brick in said county; that the members of said association were manufacturers of and dealers in and sellers of brick in said county; that the defendants, D. V. Purington, William H. Weckler, Adam J. Weckler, Frederick W. LaBahn, Louis Reimer, P. J. Sexton, Edward T. Harland, Charles Harmes and William Schlake, were during said period, and still are, members of said association and engaged in the business of manufacturing and selling brick; that during said period there was in said county a voluntary association known as the Bricklayers' Union, comprising ninety-eight per cent of the competent bricklayers of said county; that while the plaintiff was lawfully conducting his business as a manufacturer of and dealer in brick, the defendants wrongfully and unlawfully conspiring, etc., to injure the plaintiff in his business and to deprive him of the legitimate profits thereof, wrongfully and corruptly conspired and agreed among themselves, and caused to be agreed by said Masons' and Builders' Association and the members thereof, that such members should not purchase, nor be permitted to purchase, any brick to be used by them, or any of them, from any person, firm or corporation except such as had subscribed to the rules and regulations of said Masons' and Builders' Association, to which said rules and regulations the plaintiff was under no obligations to subscribe; that said Bricklayers' Union wrongfully and corruptly took action assuming to bind and pledge its members not to handle or lay any brick manufactured by any person who had not subscribed to the rules and regulations of said Masons' and Builders' Association, which said action or

pledge was accepted and acted upon by the members of said union and defendants; that after the making of said agreements and pledges, and with the unlawful purpose of injuring, etc., the plaintiff's business and of preventing and precluding him from conducting his said business in Cook county with profit, the defendants procured persons to go to customers of plaintiff and to attend at the places where brick of the plaintiff were bought to be used in constructing buildings in said county, and then and there wrongfully represented to the said customers and said workmen employed to lay and work with brick of the plaintiff, that if said customers should purchase or said workmen use brick manufactured by plaintiff, such customers and workmen would be prevented from completing or proceeding with any building or structure upon which it was proposed to use the brick of plaintiff; that in furtherance of their unlawful conspiracy in that behalf the defendants have, by wrongful threats and the imposition of fines upon persons dealing in or using the brick of plaintiff in said county, prevented sundry customers of plaintiff from purchasing brick from plaintiff and from completing contracts in which such brick would have been used, and have prevented workmen from laying or using plaintiff's brick, and have made wrongful and malicious threats, whereby customers of plaintiff have been deterred from buying or using plaintiff's brick; that by means of said several agreements and said wrongful, unlawful and malicious acts and interference of the defendants and the aforesaid unlawful conspiracy in that behalf, the plaintiff has been wholly deprived of the sales of brick in said county which he otherwise would have had, and has been and is unable to dispose of and sell his brick in said county, and has lost and been deprived of divers large gains and profits, etc., and by means of the premises the business of the plaintiff has been greatly damaged and rendered less profitable and the value of his lands and buildings greatly depreciated, to the damage of the plaintiff in the sum of \$100,000."

Plaintiff also filed a specific bill of particulars, in which he set forth various alleged acts of defendants in furtherance of the unlawful combination and conspiracy as above charged in the declaration.

The defendants filed their plea of not guilty, and upon a trial before the court and a jury a verdict was returned for \$22,000. The suit was subsequently dismissed as to William Schlake and judgment rendered upon the verdict against the other defendants, all of whom except J. C. Thompson and the Masons' and Builders' Association perfected their appeal to the Appellate Court, where, after a *remittitur* of \$7000, the judgment was affirmed as to all of the defendants except P. J. Sexton, who died pending the appeal. From this judgment of affirmance a further appeal has been prosecuted to this court.

GEORGE W. PLUMMER, and WHARTON PLUMMER, for appellants.

EDWIN F. ABBOTT, for appellee.

Mr. JUSTICE WILKIN delivered the opinion of the court:

Much space has been taken up by the appellants in their brief and argument in the discussion of the question whether or not the evidence shows that appellants were guilty of an unlawful conspiracy, as charged in the declaration; whether or not the plaintiff proved by the evidence that he was injured as a manufacturer and dealer in brick; whether or not the verdict is sustained by the evidence, and many other questions which are conclusively settled by the judgment of the Appellate Court. As is well understood, we have nothing to do with controverted questions of fact, hence our inquiry is limited to but few of the points discussed by counsel for appellants.

At the close of plaintiff's evidence, as well as at the close of all of the testimony offered at the trial, the court was

asked to instruct the jury to find for the defendants, which instructions were refused, thus raising the question whether there is any evidence in the record fairly tending to support the allegations of the declaration, and whether or not the allegations of the declaration, under the facts, are sufficient to charge defendants with an unlawful conspiracy to injure the business of appellee.

The Appellate Court recited the following facts as appearing from the evidence: "The negotiations between the Masons' and Builders' Association which led to the agreement complained of, began in December, 1897, with the appointment of a committee by the Brick Manufacturers' Association, which obtained the appointment of a committee of the Masons' and Builders' Association, and the two committees in conference formulated the agreement. This seems to have finally gone into effect prior to October 1, 1898. The resolution of the Masons' and Builders' Association adopted at the time of the appointment of its committee of conference, provided, *inter alia*, that 'whereas, the brick manufacturers now have an organization which takes in all of the brick manufacturers of Cook county and vicinity, and believing that it is established upon a sound and practical basis, and believing the system will control the price of brick in the future,' and that an agreement would 'greatly benefit and advance the interests of the Chicago Masons' and Builders' Association and will strengthen the Brick Manufacturers' Association as well,' therefore the committee be appointed, which was accordingly done; that the substantial provisions of the agreement thus made are, that the members of the Masons' and Builders' Association who sign the agreement agree to buy sewer, hollow and common brick only from such members of the Brick Manufacturers' Association as have signed the agreement and are in good standing in said association, and the members of the Brick Manufacturers' Association who sign the agreement agree to give to the members of the Masons' and Builders' Asso-

ciation signing the agreement and in good standing, a trade discount from the trade price of one dollar a thousand brick. On all brick sold to purchasers outside of the Masons' and Builders' Association the brick manufacturers agree to pay into their treasury one dollar a thousand, the fund thus created to be divided every six months equally, one-half to their own members who have signed and are faithful members of the Masons' and Builders' Association. There are provisions for enforcing the terms of the agreement by imposition of fines and penalties, and it was to take effect on and after April 1, 1898, within the limits of Cook county and north of the Joliet branch of the Michigan Central railroad in Lake county, Indiana; that there is evidence tending to show that the plaintiff was the principal competitor in Cook county of the members of the Brick Manufacturers' Association; that his plant had a capacity of from 50,000 to 60,000 bricks a day, or about 15,000,000 bricks per year; that it was well equipped with machinery and 'the clay was all right.' It appears that plaintiff was at one time a member of the Masons' and Builders' Association, and that he made efforts to secure admission to the Brick Manufacturers' Association without success. These associations and associates, the brick manufacturers, the masons and builders and the Bricklayers' Union, employed business agents and secret service men, whose business it was to see that the rules formulated to make effective the agreement between them were observed by their membership. There is evidence tending to show that after the agreement in question was in active force and operation the plaintiff's business began to be interfered with by these agents and secret service men; that contractors and owners who were purchasing and using plaintiff's brick were compelled to cease using them; that large orders and sales were canceled; that one owner was compelled to pay a fine to the Masons' and Builders' Association before being permitted to complete with plaintiff's brick a building which was under way; that workmen were directed

not to lay plaintiff's brick because he was not in the combination, and there is evidence of particular cases in which such interference occurred. In one case where, as the evidence tends to show, money had to be paid to the Masons' and Builders' Association for the privilege of using plaintiff's brick to complete a job then under way, in order to get the work completed, the association afterward returned the money when threatened with legal procedure. The plaintiff testifies that the result of the combination and consequent interference with his business was that his brick became 'absolutely worthless. There wasn't hardly a man in Chicago that would handle them. The workmen all belonged to the union, practically, and the hod carriers would not handle them or the bricklayers wouldn't lay them.' He testifies that he was called on by the secretary of the Masons' and Builders' Association, who told plaintiff 'that the joint committee of the master masons and the brick manufacturers' crowd had just had a joint session in the next room adjoining my office and had directed him to inform me that they requested me to sell no more brick in the city of Chicago or Evanston. I told him they must be wrong,—that it was equivalent to asking me to quit business. He said 'there is no mistake on my part; the committee have just adjourned and the members are still in the next room.' I said, 'Go back and tell them they are a bigger lot of fools than I thought they were,' and I made a similar request of them."

We think the foregoing finding as to the facts is sustained by the proofs. The question of unlawful conspiracy to injure the business of another, and the necessary elements to constitute it, has been before this court on other occasions. Our Reports contain many well considered cases on the subject. No person or combination of persons can legally, by direct or indirect means, obstruct or interfere with another in the conduct of his lawful business, and any loss willfully caused by such interference will give the party injured a right of action for all damages sustained. All parties to a

conspiracy to ruin the business of another because of his refusal to do some act against his will or judgment are liable for all overt acts illegally done pursuant to such conspiracy and for the subsequent loss, whether they were active participants or not. (*Doremus v. Hennessy*, 176 Ill. 608; *O'Brien v. People ex rel.* 216 id. 354.) To the same effect see *Smith v. People*, 25 Ill. 9; *Craft v. McConoughy*, 79 id. 346; *More v. Bennett*, 140 id. 69; *Foss v. Cummings*, 149 id. 353; *American Live Stock Commission Co. v. Live Stock Exchange*, 143 id. 210; *Harding v. American Glucose Co.* 182 id. 551; *Lasher v. Littell*, 202 id. 551; *Chicago, Wilmington and Vermilion Coal Co. v. People*, 214 id. 421. To the same effect are the decisions of courts in other jurisdictions. See cases cited in *Doremus v. Hennessy*, *supra*, on page 616.

Under the authorities above cited and in view of the evidence as it appears in the record there is evidence fairly tending to show that appellants were guilty of an unlawful combination and conspiracy to maliciously injure the appellee's business. The court committed no reversible error in refusing to instruct the jury to find for the defendants.

Complaint is also made of the rulings of the court in the admission and exclusion of evidence and in giving and refusing instructions. All of these alleged errors are based upon the theory that the appellants were not guilty of an unlawful combination and conspiracy. In each instance the evidence admitted tended to prove the allegations of the declaration, and was therefore competent. The instructions given announced the law of conspiracy as held in the foregoing decisions and those refused laid down a contrary rule.

We find no reversible error, and the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

THE MANUFACTURERS' EXHIBITION BUILDING COMPANY
v.
JOSEPH I. LANDAY.

Opinion filed December 20, 1905.

1. CORPORATIONS—*by-laws must be made by board of directors or managers.* The word "may," used in section 6 of the act relating to corporations, providing that by-laws "may" be adopted by the board of directors or managers, means that by-laws must be adopted by the directors or managers, and not by the stockholders.

2. SAME—*stockholders have no power to adopt or amend by-laws.* In Illinois, where the power to adopt by-laws is conferred by statute upon the board of directors or managers, the stockholders have no power to adopt or amend them, and have no right to provide that any amendment of the by-laws must be ratified by the stockholders before it may become operative.

3. SAME—*when by-laws will be held to have been adopted by directors.* Where the directors and the stockholders of a corporation are the same persons, there being no stockholders who are not directors, by-laws adopted by the stockholders will be held to have been adopted by the directors.

4. SAME—*when action by the board of directors is binding.* A resolution abolishing the salary of the vice-president of the corporation, adopted by the board of directors as an amendment to a by-law, is binding even though it is not ratified by the stockholders, who were the same persons who comprised the board of directors, even though one of the by-laws of the corporation makes such a ratification essential to the force of any amendment adopted by the directors.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. A. H. CHETLAIN, Judge, presiding.

This action is a suit at law brought by appellee, against appellant, to recover \$250 for salary claimed by appellee to be due from appellant for services rendered as vice-president of the Manufacturers' Exhibition Building Company, a private corporation, for the months of March and April, 1903. The pleadings consisted of the common counts and general

issue, and a stipulation of facts was filed containing the provision that the pleadings as to both parties should be considered sufficient for the introduction of evidence on behalf of either party. Trial was had before the court without a jury, and various propositions of law, in writing, were submitted by both appellant and appellee to be held as the law of the case. The propositions submitted by appellee were held to be the law and those presented by appellant refused, and judgment was accordingly entered for the sum of \$250. On appeal to the Appellate Court this judgment was affirmed, and the case comes to this court upon a certificate of importance.

The facts in the case briefly show that appellant is a close corporation, one-half of the stock being owned by Joseph S. Meyer, the president, and the other half being owned by appellee, vice-president of the company. The appellant was incorporated with a capital stock of \$6000, divided into one hundred and twenty shares of the par value of \$50 per share. The first meeting of the stockholders was held on March 11, 1901. At this meeting a board of three directors was elected, who adopted certain by-laws for the government of said corporation. On July 26, 1901, the board of directors was increased from three to four, and on September 25, 1902, Joseph S. Meyer, the president, who was the real owner of sixty shares, and James A. Pugh, who was the real owner of the other sixty shares, elected themselves as directors, and also elected their wives as the other two directors, transferring one share of stock to each of their wives. Shortly afterwards a disagreement arose between Meyer and Pugh, and Meyer succeeded in getting appellee to purchase the stock belonging to Pugh, informing him that his salary would be fixed, as vice-president, at the sum of \$250 per month for a short period and then fixed at the sum of \$1500 per annum. Appellee purchased the Pugh sixty shares, and after his purchase, Meyer, the president, transferred one share of his stock to an employee by the

name of Charles G. White. At a meeting of the stockholders on September 27, 1902, Meyer, his wife and White were each elected directors of the corporation and appellee was elected as the other director. At this meeting of the stockholders an amendment to the by-laws was adopted, fixing the salary of the president at \$3000 per annum, and the salary of the vice-president for the months of October, November and December, 1903, at the rate of \$250 per month and thereafter at the sum of \$1500 per annum, payable in monthly installments, and providing that no other officer should be allowed compensation for his services. This amendment was adopted by the unanimous vote of all the stock of the corporation, the stockholders and directors, of course, being the same identical persons, as the directors owned all of the stock. On the same day a special meeting of the board of directors was called and appellee elected vice-president, and his salary thereafter paid, according to the terms of the by-laws, to March 1, 1903. Section 16 of the by-laws which had been adopted provided that the by-laws might be altered or amended at any meeting of the stockholders by a majority vote of the stock represented at such meeting, or by a two-thirds majority vote of the board of directors at any regular meeting, such action by the board of directors to be ratified and confirmed at the first meeting of the stockholders thereafter. On February 9, 1903, at a regular meeting of the board of directors a resolution was proposed by Gussie W. Meyer, proposing an amendment to the by-laws, which provided that the salary of the vice-president should cease after the second Monday of March, 1903. A vote upon this amendment stood: those voting in the affirmative, three, and those voting in the negative, one. At the annual meeting of the stockholders in March, 1903, a resolution was offered by appellee that the proposed amendment be not ratified or adopted. The vote upon this resolution resulted in the ayes voting sixty shares and the nays sixty shares.

A. W. BRICKWOOD, (C. STUART BEATTIE, of counsel,) for appellant:

The provisions of the general Incorporation law are the appellant's charter. *Navigation Co. v. Railroad Co.* 130 U. S. 1; *Pcople v. Gas Trust Co.* 130 Ill. 268; *Danville v. Water Co.* 178 id. 299; *Bixler v. Summerfield*, 195 id. 147; *Traction Co. v. Chicago*, 199 id. 484.

Appellant's corporate powers must be exercised by the board of directors, which "may adopt by-laws for the government of the officers and the affairs of the company." Hurd's Stat. 1903, chap. 72, sec. 6.

Stockholders have enumerated powers given by statute, but no power to enact or reject by-laws is included therein. *Expressio unius exclusio alterius*. The power must be exercised as provided by statute, and not otherwise. Potter's Dwarrris on Stat. 72, and authorities cited; id. 229; *People v. Loeffler*, 175 Ill. 585; *McGann v. People*, 194 id. 526.

The corporate machinery in which the statute has vested the power to make by-laws cannot delegate the power. *People v. Sterling Manf. Co.* 82 Ill. 457; *Supreme Lodge v. McLennan*, 171 id. 417; *Supreme Lodge v. Kutscher*, 179 id. 340; *Insurance Co. v. Keyser*, 32 N. H. 313; *Alters v. Bricklayers' Ass.* 19 Pa. 272.

The stockholders as such, or the board of directors as such, could not by any vote limit the power of the board of directors to pass any reasonable and lawful by-law in the future. *Supreme Lodge v. Kutscher*, 179 Ill. 346; *Insurance Co. v. Keyser*, 32 N. H. 313; *Smith v. Nelson*, 18 Vt. 511; *Fullenwider v. Royal League*, 180 Ill. 621; *Baldwin v. Bagley*, 185 id. 19; *Insurance Co. v. Kentner*, 188 id. 431; *Dornes v. Supreme Lodge*, 75 Miss. 466.

Appellee was not entitled to a salary as an officer of the corporation except by resolution or by-law. *Gridley v. Railway Co.* 71 Ill. 200; *Alston Manf. Co. v. Squair*, 105 Ill. App. 238; *Fritz v. Building Ass.* 186 Ill. 183.

FRANK W. WHEELER, FRED B. SILBER, and MARTIN J. ISAACS, for appellee:

The power to enact and repeal by-laws is inherent in the corporation. The stockholders are the body of the corporation. *Alters v. Bricklayers' Ass.* 19 Pa. 272; *Insurance Co. v. Farquhar*, 86 Md. 671; *Lovell v. Westwood*, 2 Dow & Cl. 21; 4 Thompson on Corp. sec. 5314; 1 id. sec. 955; 1 Cook on Corp. sec. 4; *Bank v. Smith*, 19 Johns. 115; *Gravel Road Co. v. Wysong*, 51 Ind. 4.

The delegation by the legislature to the board of directors of the power to adopt by-laws does not deprive the stockholders of the power to adopt and repeal by-laws. *Lovell v. Westwood*, 2 Dow & Cl. 21; 1 Thompson on Corp. sec. 959.

The right to amend by-laws is subject to a limitation contained in the charter or in the by-laws themselves. *Stevens v. Davison*, 18 Gratt. 819; *Loewenthal v. Rubber Reclaiming Co.* 52 N. J. Eq. 440; *Mutual Aid v. Monti*, 59 N. J. L. 341.

Where by-laws prescribe a mode of amendment which is reasonable and not in conflict with the law of the land or with the charter of the corporation, that mode must be followed. *Stevens v. Davison*, 18 Gratt. 819; *Heintzelman v. Druids Relief Ass.* 38 Minn. 138; *Thibert v. Supreme Lodge*, 81 N. W. Rep. 223; *Alters v. Bricklayers' Ass.* 19 Pa. 272; *Insurance Co. v. Farquhar*, 86 Md. 671; *Mutual Aid v. Monti*, 59 N. J. L. 341.

Each holder of stock by transfer becomes a party to the original contract. *Loewenthal v. Rubber Reclaiming Co.* 52 N. J. Eq. 440.

The by-laws of a corporation constitute a contract between each stockholder and the corporation. *Life Assurance Co. v. Erlenkoetter*, 90 Ill. App. 102; *Loewenthal v. Rubber Reclaiming Co.* 52 N. J. Eq. 440; *Alters v. Bricklayers' Ass.* 19 Pa. 272; Morawetz on Corp. sec. 499; *Kent v. Quicksilver Mining Co.* 78 N. Y. 159; *Fullenwider v. In-*

insurance Co. 180 Ill. 625; *Metropolitan Ass. v. Windover*, 137 id. 434; *Becker v. Insurance Co.* 48 Mich. 610.

Section 1 of article 16 of the by-laws of the corporation imposed a limitation upon the power of amendment by the board of directors, and the board of directors had no power, under said by-laws or otherwise, to disregard the provisions of said by-law, which imposed a limitation upon the board of directors to alter or amend the by-laws. *Stevens v. Davison*, 18 Gratt. 819; *Loewenthal v. Rubber Reclaiming Co.* 52 N. J. Eq. 440; 4 Thompson on Corp. sec. 5314; *Heintzelman v. Druids Relief Ass.* 38 Minn. 138.

Stockholders are estopped from denying the validity of a code of by-laws which they themselves adopt and hold out to the world as valid. *People v. Sterling Manf. Co.* 82 Ill. 457; *Morrison v. Dorsen*, 48 Md. 461.

Mr. JUSTICE RICKS delivered the opinion of the court:

It will be seen from the statement that the issue raised upon the propositions of law presented and involved in this suit is whether the resolution of the board of directors on February 9, 1903, attempting to amend the by-laws relating to the salary of the vice-president, was effectual without being ratified and confirmed by the stockholders at the first meeting of the stockholders thereafter.

The statute in reference to corporations (Hurd's Stat. 1903, sec. 6, p. 473,) provides: "The corporate powers shall be exercised by a board of directors or managers. * * * The officers of the company shall consist of a president, secretary and treasurer, and such other officers and agents as shall be determined by the directors or managers, and the directors or managers may adopt by-laws for the government of the officers and affairs of the company."

It will be seen from the reading of the statute that the office of vice-president is not provided for, except that the board of directors or managers may provide for other "officers and agents." There is no other provision in the stat-

ute relating to corporations providing for the making of by-laws, and while the statute uses the word "may," no interpretation could be made other than that "may" means "shall," (providing that by-laws are to be adopted.) The words "may" and "shall" are frequently used interchangeably, as will best express the legislative intent, and one may be used for the other, and such construction should be placed upon the statute with reference to the two words as seems consistent. Both words and phrases are sometimes transposed, if by so doing the legislative intention can be determined. *Wabash, St. Louis and Pacific Railway Co. v. Binkert*, 106 Ill. 298.

Under our statute a corporation can act only through its board of directors and officers. Its property is not subject to the control of its members or its stockholders. (*Sellers v. Greer*, 172 Ill. 549.) In *Allemong v. Simmons*, 124 Ind. 199, where the owner of five-sixths of the stock of a corporation, who was also a director, undertook to enter into a contract, the court held that he had no power to make the contract for the corporation, as it could only be bound by the action of the board of directors. It was also held that the power could be conferred upon one person by the board of directors to enter into a contract which would be binding upon the company, but that the action should be by a majority of the board of directors.

In *Humphreys v. McKissock*, 140 U. S. 304, in discussing the rights of stockholders, the court said: "Both the commissioner, and the court in confirming his report and entering the decree mentioned, seem to have confounded the ownership of stock in a corporation with the ownership of its property. But nothing is more distinct than the two rights. The ownership of one confers no ownership of the other. The property of a corporation is not subject to the control of individual members, whether acting separately or jointly. They can neither encumber or transfer that property nor authorize others to do so. The corporation—the

artificial being created—holds the property and alone can mortgage or transfer it; and the corporation acts only through its officers, subject to the conditions prescribed by law."

In *Smith v. Hurd*, 12 Metc. 385, it is said: "The individual members of a corporation, whether they shall all join or each act severally, have no right or power to intermeddle with the property or concerns of the bank, or call any officer, agent or servant to account or discharge them from any liability. Should all the stockholders join in a power of attorney to any one he could not take possession of any real or personal estate, any security or choses in action; could not collect any debt or discharge a claim or release damage arising from any default, simply because they are not the legal owners of the property and damage done to such property is not injury to them. Their rights and their powers are limited and well defined."

In *Hopkins v. Roseclare Lead Co.* 72 Ill. 373, it was held that a stockholder, simply because he owned a majority of the stock, could not act for the company unless he was specially authorized, and while he had a right to control an action of the company by the election of its officers, still the company could only act through its officers or by delegating its powers to others.

In Cook on Stockholders (3d ed. sec. 709,) it is said: "The stockholders cannot enter into contracts with third persons. Contracts between the corporation and third persons must be entered into by the directors, and not by the stockholders. The corporation, in such matters, is represented by the former and not by the latter. Such is one of the main objects of corporate existence. To the directors is given the management and formation of corporate contracts. The stockholders cannot, in meeting assembled, bind the corporation by their contracts in its behalf. Although one person owns a majority of the stock, or all of it, or all but two shares, he does not, in consequence thereof, acquire

the right to act for the corporation or as the corporation, independently of the directors. One person may own all the stock, and yet the existence, relations and business methods of the corporation continue. A single stockholder cannot make a contract for and in the name of the corporation which shall have any binding force or validity, except by subsequent ratification or adoption in the regular manner."

The regular manner in which a ratification of a contract could be made or by-laws enacted would be the manner provided by statute. Although the power of making by-laws is vested in the managers of the corporation and not in the shareholders, a by-law passed at a meeting called as a shareholders' meeting will be valid if the shareholders and managers were the same persons and all were present and participated. But that would not prohibit the regularly constituted law-making body of the corporation to amend or change its by-laws at any time it saw fit. Under the common law it was no doubt the duty of the stockholders to enact by-laws regulating the affairs of the company, and it may be that where a corporation had its existence at common law, and subsequent to its creation its charter was so amended as to give the power of making by-laws to a select body, this amendment might not necessarily be held to deprive the body at large of its common law power to make by-laws, for the reason that the body at large, being the primary source of authority, was not, by the mere act of conferring upon the select body special powers, deprived of its general powers unless so provided by its charter act. This we regard as the effect of the holding in *Lovell v. Westwood*, 2 Dow & Clark, 21; and the authorities cited by the appellee, to the effect that the stockholders have power to adopt by-laws notwithstanding the statute confers that power on the board of managers or directors, all seem to rely upon the above case. But where, as in our State, there is a statute specially providing the mode and manner in which a corporation is organized and controlled and its by-laws enacted, under

which statute this corporation has its existence, if any particular manner is pointed out by the statute as to the manner in which the by-laws should be adopted we are unable to see how any other legal method could be resorted to. Surely there could be no doubt as to the right of the directors, under the statute, to abolish the office of vice-president, as the office could not be created in any manner except by the board of directors, there being no statutory provision for such an office. While it is true that at a meeting of the stockholders a by-law was enacted providing that no amendment to its by-laws could be made without being ratified by the stockholders, yet the stockholders and directors were the same persons, all directors being stockholders and all stockholders being directors. The making of the by-laws would, in fact, be held to be made by the persons authorized by statute to make the same, which would be the board of managers or directors. (*People ex rel. v. Sterling Burial Case Manf. Co.* 82 Ill. 457.) And if the by-laws were enacted by the directors,—which we must hold was done,—we can see no reason why they could not amend any by-law enacted by them. If the stockholders have no right to make by-laws, why should they have any voice in amending them? The law charges the board of managers or directors with the duty of making the by-laws necessary for the proper conduct of the business of the corporation. If it be held that the limitation found in by-law No. 16, requiring the ratification by the stockholders of a change of the by-laws made by the directors, is valid and binding, then we are to hold, in effect, that one board of directors at one time may place a limitation upon themselves or future boards of directors in the matter of making by-laws, and add requirements neither provided for in nor contemplated by the law of their creation. Such, we think, is not the law, nor do we think it should be so. The best interest of the corporation, and not the interest of the individual stockholder, is the consideration that should move the directors to make by-laws, and if such

limitation were placed upon their authority they would be powerless to perform their duty except in cases where the proposition was such as met the individual notion of the holders of a majority of the stock.

While the question here considered has not been before us in the exact form it is now presented, a similar question was considered in *Supreme Lodge Knights of Pythias v. Kutscher*, 179 Ill. 340, and the views we now express are in harmony with and in full analogy to the views expressed in that case and others that might be cited.

There being a statutory provision providing for the manner in which by-laws should be enacted, and the manner provided for having been observed by the board of directors in its meeting, we are of the opinion that the stockholders had no right to limit the action of the directors in reference to the making of its by-laws, and therefore had no right to provide that any amendment made to the by-laws by the directors should be ratified by the stockholders before it became operative. It therefore follows that the amendment made by the directors was legal even if the by-laws were adopted by the stockholders, as the stockholders and the directors were the same.

Such being our view of the law, the trial court erred in holding propositions of law presented by appellee to be the law and refusing those presented by appellant, and the Appellate Court also erred in rendering judgment affirming the judgment of the trial court.

The judgments of both the Appellate and the trial courts are therefore reversed, and the cause is remanded to the superior court of Cook county for such further proceedings as to law and justice may appertain.

Reversed and remanded.

THE ILLINOIS, IOWA AND MINNESOTA RAILWAY COMPANY

v.

FREDERICK BORMS.

Opinion filed December 20, 1905.

EMINENT DOMAIN—*when proposed building of depot and elevator close to defendant's land is not a special benefit.* The proposed building of a depot and elevator upon land adjoining the defendant's farm through which the railroad is seeking to condemn a right of way is not a special benefit which the petitioner is entitled to have considered by the jury as reducing the defendant's damages, where such proposed action is grounded upon a deed made by a third person, which might be canceled at any time and a re-conveyance made without the defendant's consent.

APPEAL from the County Court of Will county; the Hon. ARTHUR W. DESELM, Judge, presiding.

The appellant, the Illinois, Iowa and Minnesota Railway Company, filed its petition in the county court of Will county to condemn for a right of way .764 of an acre of land across the north-west corner of an eighty-acre tract owned by appellee, Frederick Borms. Appellee filed his cross-petition, in which he alleged that the right of way sought to be condemned would cross the corner of his eighty acres in close proximity to certain buildings on his farm, thus causing danger from fire and injury from dust, cinders, ashes, gases and smoke from its engines, thereby raising his rate of insurance; that his stock yards and his places for stacking and thrashing grain were located near this corner; that the entrance to his yard would be a trifle over one hundred feet from the highway; that the building and operation of the road would necessitate the removal of certain buildings, all of which would damage his property in the sum of \$2500. Appellant demurred to the cross-petition and the demurrer was overruled. Upon a trial the jury returned a verdict for \$150 for land actually taken and \$1100

as damages to land not taken. Judgment was rendered on the verdict, and an appeal has been prosecuted to this court.

P. C. HALEY, J. L. O'DONNELL, and T. F. DONOVAN,
for appellant.

C. W. BROWN, for appellee.

Mr. JUSTICE WILKIN delivered the opinion of the court:

It is first insisted by appellant as a ground of reversal that there is no evidence to sustain the value of \$150 placed by the jury upon the land actually taken. The jury did not view the premises and we must look solely to the record for such proof. The appellee called six witnesses to testify to the value of the land taken. They placed its value from \$140 to \$170. Appellant insists that these amounts take into consideration some element of damage which should not have been considered. We think the fair interpretation to be given to the evidence of these six witnesses is that the land actually taken is alone worth the amount stated by them. While the witnesses for appellant placed the value of the land actually taken at a less figure than did the witnesses for appellee, yet we cannot say that the verdict in this regard is not fairly supported by the evidence.

Appellant offered in evidence a deed from Conrad Andres and wife to the railroad company conveying a strip of land for a right of way through the premises of the grantors, together with an additional strip on which the company was to erect a depot and elevator. A resolution of the board of directors of appellant was also offered adopting a map of the right of way through Will county, showing the location of the depot and elevator on the Andres land, which adjoined the land of appellee. Appellant also sought to show by certain witnesses that by reason of the location of the depot and elevator on the Andres land the land of appellee would be benefited in excess of the damages, by affording

him a closer and better market for his farm products. Objections were sustained to all of this evidence, and the court instructed the jury that in estimating the damages to appellee's land not taken they were not to consider such general benefits, if any, which might be derived from the construction and operation of the road,—meaning by general benefits, those which the land would share in common with others in the same vicinity by making a better market or by affording conveniences for trade and travel. This ruling of the court is assigned as error.

The consideration of this question raises the inquiry as to what are to be treated as general benefits and what as special benefits in such cases. It is conceded by both parties that general benefits cannot be considered against damages, whereas special benefits may, and it is claimed by appellant that the location of a depot and elevator upon land adjacent to that of appellee would constitute such a special benefit as would entitle it to have the damages proportionately reduced. In the case of *Metropolitan West Side Elevated Railway Co. v. Stickney*, 150 Ill. 362, we said (p. 382): "Special benefits are such benefits flowing from the proposed public work as appreciably enhance the value of the particular tract of land alleged to be benefited. As already said, the fact that other property in the vicinity is likewise increased in value from the same cause,—that is, also specially benefited by the improvement,—furnishes no excuse for excluding the consideration of special benefits to the particular property in determining whether it has been damaged or not, and if it has, the extent of the depreciation in value. * * * On the one hand, the damages must be real and substantial; on the other, the benefits must be such as affect the market value or use of the land and such as are capable of measurement and computation. Hence, all imaginary and merely speculative damages or benefits are excluded from consideration." This decision is sustained by an unbroken line of authority in this State, and the question therefore is

whether the benefits sought to be proven by appellant were such as were general or special, within the rule there announced.

The alleged benefits were founded upon a deed of conveyance to appellant made by a third party, in which it was agreed to build a certain depot and elevator. Appellee had nothing to do with that deed of conveyance. It was not binding upon him nor could he enforce it, and all benefits which might be assessed against him could be defeated by a quit-claim deed or relinquishment of Andres to appellant.

The court committed no error in its rulings on evidence and instructions to the jury.

We find no reversible error in the record, and the judgment of the county court will be affirmed.

Judgment affirmed.

THOMAS NOBLE

v.

ELIZABETH TIPTON *et al.*

Opinion filed December 20, 1905.

1. **DEEDS**—*deed given to custodian but subject to recall is not delivered.* A deed enclosed in an envelope and given to a custodian to be delivered after the grantor's death, but with the reservation that the grantor retained the right to recall it, is not delivered, and is not operative as a deed though delivered by the custodian after the grantor's death.

2. **WILLS**—*when recital cannot be given effect of a devise.* A recital in a will referring to certain property as having been theretofore deeded, the deed to which is invalid for want of delivery, cannot be given the effect of a devise; nor does the recital aid in establishing that there was a valid delivery of the deed so as to make it operative.

3. **PARTITION**—*rule where one co-tenant has made improvements.* In partition, where one co-tenant has made improvements, the court should, if possible, allot to him the portion so improved without considering the value of the improvements; but if such a division cannot be made the court should allow him remuneration for increased value of the premises caused by the improvements.

4. SAME—*when provision in partition decree is erroneous.* In partition, where the defendant, in his answer and cross-bill, sets up the making of improvements while in possession of the land as the ground for insisting upon his ownership and the validity of his deed, it is error, on awarding partition, to decree that the defendant's notes, which he had given to his father for money borrowed to pay for the improvements and which were a part of the general estate, should be canceled to the extent of a certain part of the amount expended for the improvements.

APPEAL from the Circuit Court of Carroll county; the Hon. OSCAR E. HEARD, Judge, presiding.

C. L. HOSTETTER, for appellant.

RALPH E. EATON, for appellee.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

On May 22, 1904, John Noble, of Carroll county, died, leaving three sons, Thomas Noble, the appellant, John Noble and Robert Noble, and six daughters, Elizabeth Tipton, Ada Ostandere, Isabel Summerville, Anna Herrington, Maggie Fickes and Lydia McPeak, his heirs-at-law. He owned at the time of his death about 400 acres of land and personal property amounting to over \$18,000, in addition to the lands known as his home farm, containing 503.56 acres, which are the subject of this controversy. He left a will, by which he disposed of all his estate, real and personal, except the home farm, and stated in the will that he had previously deeded that farm to his son Thomas Noble. He had executed a deed of the farm, dated August 24, 1897, to Thomas Noble, and the deed was in the possession of a custodian, who delivered it to the grantee a few days after the death of John Noble, and it was then put on record. On June 15, 1904, Elizabeth Tipton and Ada Ostandere, two of the appellees, filed their bill in this case against the other heirs, alleging that said deed of the home farm to Thomas

Noble was never delivered, and they prayed that the deed should be declared null and void as a cloud upon their title and that the court would partition the premises between the heirs. Thomas Noble, the appellant, answered, alleging that the deed was made, executed and delivered on the day of its date; that it was deposited with Joseph S. Miles, the cashier of the First National Bank of Mt. Carroll, to be delivered to him upon the death of his father, and that, relying upon the deed and his ownership of the premises, he had made large expenditures and improvements on the farm by the erection of valuable buildings thereon. Three of the defendants, Isabel Summerville, Robert Noble and John Noble, filed a joint answer, disclaiming any interest in the premises and alleging that their father, John Noble, gave the farm to Thomas Noble, who took possession of it; that the deed was delivered to Joseph S. Miles to be delivered to the grantee on the death of John Noble, and that it was so delivered and the farm was rightfully the property of Thomas Noble. Thomas Noble filed a cross-bill with the same allegations contained in his answer, and asked the court to declare that the deed was duly executed and delivered and barred the defendants from setting up any claim to the premises. The complainants in the original bill and three of the other heirs answered the cross-bill, denying the delivery of the deed. There was a hearing of the evidence, and the court entered a decree finding that the deed was made and acknowledged but that it was never delivered. The deed was declared null and void and a partition was ordered, and a credit of \$3000 was allowed to Thomas Noble upon notes held by him as executor of his father. The cross-bill was dismissed for want of equity. From that decree Thomas Noble prosecuted an appeal to this court.

The following facts were proved at the hearing: In the spring of 1897 John Noble, then seventy-four years of age, turned his home farm over to his son Thomas Noble, the appellant, with the intention and understanding that the son

should have the farm after his death. In order to carry out his purpose he made and acknowledged the deed in question on August 24, 1897. The deed recited that it was made in consideration of natural love and affection, and it was attested by two witnesses. It was not delivered at that time, and ten months later, on June 10, 1898, John Noble made his last will and testament, disposing of all his property except the home farm, which was mentioned in the will as having been deeded to his son Thomas Noble. He took the will and the deed in question, and another deed, to Joseph S. Miles, cashier of the First National Bank of Mt. Carroll, and Miles put them in an envelope and made the following memorandum thereon in accordance with directions given to him at the time :

"John Noble.—The deeds within to be delivered to grantees after death of grantor. The will to be delivered to the proper officers. All of said property to be held subject to the order of John Noble."

John Noble was a widower, and after he turned the farm over to his son the two lived there together. Thomas employed the house-keeper, paid the grocery bills and made valuable improvements on the place, one of which was a large barn costing \$3000. He had the general management of the place and the father had very little to do with it, although he sold from the place a few dollars' worth of wood and sand. For the purpose of paying for the improvements Thomas Noble borrowed money from his father, for which he gave his notes, which were unpaid and are a part of John Noble's estate. It was the fixed purpose and intention of John Noble that his son Thomas should have the farm after his death, and Thomas was informed of that intention and of the making of the deed, and relied upon it. John Noble told many different persons, including his other sons and at least one of his daughters, that he had made the deed; that he wanted Thomas to have the home farm and had left it to him, and that it was Thomas' property. He expressed unfavorable opinions of the husbands of his daughters and

an intention not to leave any money or property to them. Whether the intention of the grantor in the deed has failed for want of a compliance with the law is the question in this case.

A delivery is essential to the validity of a deed, and to constitute a delivery the grantor must part with control over it and retain no right to reclaim or recall it. (*Hawes v. Hawes*, 177 Ill. 409; *Spacy v. Ritter*, 214 id. 266.) This deed was not delivered but was held by the custodian subject to the order of the grantor, who did not part with all control over it but retained the right to reclaim or recall it. The deed was intended as a testamentary disposition of the farm to take effect at the death of the grantor, and such a disposition can only be effected by an instrument in writing executed in conformity with the Statute of Wills. The instrument was not operative as a deed.

Counsel for appellant contends that if the deed was not operative as a conveyance the property was devised by the following clause of the will:

"Fifth—The remainder of my estate, both real and personal, excepting the home farm, containing 503½ acres, which I have heretofore deeded to my son Thomas Noble, I give, devise and bequeath to my sons Robert Noble, Thomas Noble and John W. Noble, share and share alike."

By previous provisions of the will he had disposed of his household goods and furniture and farm implements and made certain bequests to his children. The argument is, that the testator could not be presumed to intend to die intestate as to any part of his property, and that by the will he evinced an intention to devise the farm to his son Thomas, who would therefore take it by implication under the will. The rule on that subject is, that where a recital in a will is to the effect that the testator has devised something in another part of the will when in fact he has not done so, the erroneous recital may operate as a devise by implication of the same property, for the reason that it shows an intention

to devise the property by the will; but where the recital is to the effect that the testator has by some other instrument given to a certain person named in the recital, property, when in fact he has not done so, such a recital does not disclose an intention to give by the will, and in such a case resort must be had to the other instrument and not to the will. (*Hunt v. Evans*, 134 Ill. 496; *Benson v. Hall*, 150 id. 60; *Stodder v. Hoffman*, 158 id. 486.) The recital in this case is that the testator had deeded the home farm to his son Thomas, and the courts cannot give that recital the effect of a devise. Nor does the recital aid in establishing that there had been a valid delivery of the deed so as to make it operative as such. *Lange v. Cullinan*, 205 Ill. 365.

The deed did not operate as a conveyance of the property, and whether it must fail as a testamentary disposition of the farm is a question not involved under the pleadings in this case. It was in writing, signed by John Noble and attested by two witnesses, and almost any form of instrument which makes a disposition of property to take effect after the death of the maker is entitled to probate as a will if the conditions fixed by the Statute of Wills are complied with. At the conclusion of the will are these words: "revoking all former wills made." But the will also expressly recognized the continued existence and validity of the conveyance. If an instrument in the form of a deed is executed and attested with the formalities prescribed by the statute, and confers no present interest but is revocable at pleasure and not to take effect until the death of the maker, it may be operative as a will. (30 Am. & Eng. Ency. of Law,—2d ed.—576.) At any rate, the instrument could not be effective as a devise until admitted to probate, and the county court has exclusive jurisdiction for that purpose. (*Beatty v. Clegg*, 214 Ill. 34.) Where a disposition of property made by a written instrument is not to take effect until the death of the maker it is testamentary in character, and will remain subject to revocation or change during his life. (*Mas-*

sey v. *Huntington*, 118 Ill. 80.) And it is sufficient for the decision of this case that the deed was not delivered and did not take effect in the lifetime of the grantor.

The decree provided that a credit of \$3000 should be allowed to Thomas Noble upon the notes held by him as executor of the estate of John Noble, and the decree declared that notes to that amount were thereby canceled and of no effect. Appellant insists that the allowance was insufficient compensation for his improvements, and that the court had no power to set off the value of the improvements against his notes or to cancel them. There was no basis in the pleadings for the provision. Thomas Noble in his answer and cross-bill set up the making of the improvements while in possession of the farm as the ground for insisting upon his ownership and the validity of the deed. There was evidence that he made the improvements, and where one of several tenants in common has made improvements upon the property, the court should, if possible, allot to him the portion improved without taking into account the value of the improvements. (*Louvalle v. Menard*, 1 Gilm. 39; *Dean v. O'Meara*, 47 Ill. 120.) If in the partition such a division cannot be made, the court will then allow to the one making the improvements remuneration for the increased value of the premises caused thereby. (*Mahoney v. Mahoney*, 65 Ill. 400.) That course was not pursued in this case, and the provision that notes of Thomas Noble inventoried by him in the county court should be canceled to the amount of \$3000 was erroneous. If the portion of the premises on which the improvements are located should be set off to Thomas Noble the question of their value will not arise and is not now considered.

The decree is reversed and the cause is remanded to the circuit court for further proceedings in accordance with the views herein expressed. The appellant will pay one-half the costs and the appellees Elizabeth Tipton and Ada Ostandere will pay the other half.

Reversed and remanded.

THE PEOPLE, for use of State Board of Health,

v.

PETER R. LANGDON.

Opinion filed December 20, 1905—Rehearing denied Feb. 7, 1906.

MEDICINE AND SURGERY—one practicing medicine without a license before act of 1899 took effect is amenable to the act. A person practicing medicine in Illinois before the Medicine and Surgery act of 1899 took effect, (Laws of 1899, p. 273,) and who continues to practice medicine thereafter without obtaining a certificate from the State Board of Health under such act or without holding an unrevoked certificate from the State Board of Health issued prior to the taking effect of the act, is within the terms of the act and subject to its penalties.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Kankakee county; the Hon. LINUS C. RUTH, Judge, presiding.

W. H. STEAD, Attorney General, and J. BERT MILLER, State's Attorney, for the People.

TRUMAN W. SHIELDS, for appellee.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

This is an action of debt brought by the People of the State of Illinois, for the use of the State Board of Health, against Peter R. Langdon, to recover the penalty for practicing medicine without a license from the State Board of Health, imposed by section 9 of an act entitled "An act to regulate the practice of medicine in the State of Illinois, and to repeal an act therein named," in force July 1, 1899. (Laws of 1899, p. 273.) The circuit court sustained the demurrer of defendant to the declaration, and the plaintiff having elected to stand by the declaration there was judg-

ment in favor of the defendant. On appeal to the Appellate Court for the Second District the judgment was affirmed, and from the judgment of the Appellate Court this further appeal was prosecuted.

The act regulating the practice of medicine provides for the organization of the State Board of Health and the granting by said board of licenses to practice medicine in this State. There were two previous acts regulating the practice of medicine, the first in force July 1, 1877, and the second July 1, 1887, each of which provided for the granting of licenses or certificates from the State Board of Health and prohibited the practice of medicine without such license or certificate, with an exception in the first act in favor of those who had been practicing ten years before the passage of the act. Both of the previous acts made it a penal offense to practice medicine without a license or certificate. Section 9 of the present act, under which this suit was instituted, contains the following provisions: "Any person practicing medicine or surgery or treating human ailments in the State without a certificate issued by this board in compliance with the provisions of this act * * * shall, for each and every instance of such practice or violation, forfeit and pay to the People of the State of Illinois, for the use of the said board of health," certain penalties therein mentioned, and the section concludes with this proviso: "*Provided*, that this section shall not apply to physicians who hold unrevoked certificates from the State Board of Health issued prior to the time of the taking effect of this act."

There were six counts of the declaration, in each of which it was charged that at the respective dates therein named, in the year 1903, the defendant unlawfully practiced medicine and surgery and treated human ailments without a license or certificate from the State Board of Health, and three of the counts contained the additional averment that he was on July 1, 1899, illegally engaged in the practice of medicine. None of the counts averred that he began the

practice of medicine after July 1, 1899, and it is contended that without that averment the declaration stated no cause of action. The question raised is whether a person who has no license to practice medicine, who began such practice before July 1, 1899, when the present act took effect, and continued such practice thereafter without a license, is subject to the penalties named in section 9. It is clear that such a person comes within the express language of that section. He is a person who is practicing medicine without a certificate issued by the State Board of Health in compliance with the provisions of the act, and who does not hold an unrevoked certificate from the State Board of Health issued prior to the taking effect of the act. Having no license at all to practice medicine he is within the terms of the statute and subject to its penalties.

But counsel says that because section 2 only provides for the granting of licenses to persons entering upon the practice of medicine after July 1, 1899, when the act took effect, the only persons subject to the penalties imposed by section 9 are those who began the practice after that date. We do not see how that position can be maintained. The provision of section 2 relied upon is as follows: "No person shall hereafter begin the practice of medicine or any of the branches thereof, or midwifery in this State without first applying for and obtaining a license from the State Board of Health to do so." Taking that section and the other provisions of the act together, they amount to this: Any person desiring to enter upon the practice of medicine after the act took effect could only do so after first applying for and obtaining a license from the State Board of Health in compliance with the provisions of the act, and any person practicing medicine without a certificate issued under said act or an unrevoked certificate issued under previous acts was subject to certain penalties specified in section 9. The act is penal in character and is to be strictly construed, but not with such technicality as to defeat its purpose. When the true meaning

and intent of the act are apparent, the act is to be given effect in accordance therewith. (*Meadowcroft v. People*, 163 Ill. 56; *Hamer v. People*, 205 id. 570.) The proviso excluding persons practicing medicine who hold unrevoked licenses issued by the State Board of Health prior to the taking effect of the present act cannot be ignored in interpreting the act, and the proviso would be useless and senseless if the legislature intended the act to apply only to persons who began the practice of medicine after the act took effect. To say that the legislature intended to grant immunity from prosecution to persons who were unlawfully practicing medicine at the time the act took effect would be wholly unwarranted. On the contrary, an unrevoked license or certificate issued under some previous act was required by the proviso.

In the case of *State Board of Health v. Ross*, 191 Ill. 87, the question whether the State Board of Health could revoke certificates issued under a previous act was considered, and it was held that it could not. That decision was in accordance with the language of the act which provided for issuing licenses, and in one sentence provided that the board might refuse to issue a license for certain reasons and might revoke such license for like causes. The provisions for granting, refusing to grant or revoking a license under the present act relate only to persons entering upon the practice of medicine after the act took effect. But that is an entirely different proposition from the one involved in this case. It does not follow from that decision that one who has no license under the present act or any former act may practice medicine without being subject to the penalties prescribed by section 9. The court erred in sustaining the demurrer.

The judgments of the Appellate Court and circuit court are reversed and the cause is remanded to the circuit court, with directions to overrule the demurrer.

Reversed and remanded.

FRANK LYNCH

v.

JULIA HUTCHINSON *et al.*

Opinion filed December 20, 1905—Rehearing denied Feb. 7, 1906.

1. CONSTITUTIONAL LAW—*provision requiring bills to be signed by president of Senate is mandatory.* The provision of section 13 of article 4 of the constitution, requiring every bill which has passed both houses to be signed by the president of the Senate and the speaker of the House, is mandatory, even though such signatures are not conclusive evidence that the bill was properly passed.

2. SAME—*act of 1905, to extend jurisdiction of county and probate courts, is unconstitutional.* The act of 1905, (Laws of 1905, p. 186,) to extend the jurisdiction of probate courts and county courts having probate jurisdiction, so as to include the complete administration of testate estates, is unconstitutional, not having been signed by the president of the Senate.

APPEAL from the Probate Court of Cook county; the Hon. CHARLES S. CUTTING, Judge, presiding.

A. E. HATHAWAY, and J. M. CASAVAW, for appellant.

Mr. JUSTICE HAND delivered the opinion of the court:

This was a petition filed by Frank Lynch on July 21, 1905, in the probate court of Cook county, against Julia Hutchinson, Edward W. Mack and John Kelly, trustees under the last will of Michael Hutchinson, deceased, who died on February 23, 1903, and whose will was admitted to probate in said court on May 8, 1903, and which will created a trust in said estate in favor of Lynch to the extent of \$3000, praying that said trustees be required to file an account in said probate court as such trustees, under the provisions of an act entitled "An act to extend the jurisdiction of probate courts and county courts having probate jurisdiction so as to include the complete administration of testate estates." (Laws of 1905, p. 186.) The probate court declined to grant the prayer of the petition and dismissed the same o

the ground that the statute above referred to was not signed by the president of the Senate, as required by the constitution, and was not, for that reason, a valid legislative enactment, and petitioner has prosecuted an appeal to this court.

The constitution of 1870 (art. 4, sec. 13,) provides: "Every bill shall be read at large on three different days, in each house; and the bill and all amendments thereto shall be printed before the vote is taken on its final passage; and every bill, having passed both houses, shall be signed by the speakers thereof." In this case it appears the bill above referred to was not signed by the president of the Senate. The question, therefore, is presented for decision whether the constitutional provision that "every bill, having passed both houses, shall be signed by the speakers thereof," is mandatory or only directory.

In those States where the enrolled bill, duly authenticated, is held to be conclusive evidence of its passage, the provision has uniformly been held to be mandatory, while in those States where the journals of the respective houses may be looked into to determine whether the bill was passed in compliance with constitutional provisions there is a conflict of authority upon the question. (26 Am. & Eng. Ency. of Law,—2d ed.—p. 545.) In this State, while it is held that the signatures of the president of the Senate and the speaker of the House to the bill are not conclusive evidence that the bill was properly passed, and that the journals of the respective houses may be examined to determine that question, the holding has heretofore been to the effect that the provision requiring the bill to be signed by the president of the Senate and speaker of the House is mandatory. (*Spangler v. Jacoby*, 14 Ill. 297; *Turley v. County of Logan*, 17 id. 151; *Burritt v. Commissioners of State Contracts*, 120 id. 322.) We see no reason for receding from the position heretofore taken by this court upon the question, as we are convinced the doctrine as announced by this court is sound upon principle and amply sustained by authority.

Cooley's Const. Lim. (2d ed.) p. 152; *State v. Kiesewetter*, 45 Ohio St. 263; 12 N. E. Rep. 807; *State v. Platt*, 2 S. C. 150; 16 Am. Rep. 647; *Moody v. State*, 48 Ala. 115; 17 Am. Rep. 28.

The judgment of the probate court will be affirmed.

Judgment affirmed.

CHARLES F. WENHAM *et al.*

v.

ISIDORA SCHMITT *et al.*

Opinion filed December 20, 1905—Rehearing denied Feb. 7, 1906.

1. REDEMPTION—*what does not affect legality of redemption.* The legality of a redemption which complies with the statute in all respects is not affected by the fact that the party making such redemption had previously obtained an order of court restraining the sheriff from issuing any deed or from paying over any redemption money pending an appeal from an order denying a motion to set aside the sale and certificate of sale.

2. SAME—*party may redeem pending appeal.* One who appeals from an order denying his motion to set aside an execution sale and obtains an order restraining the sheriff from making any deed or paying over any redemption money pending the appeal has a right to redeem from the sale before the appeal is determined, and it is not essential to the legality of such redemption that the amount paid include interest on the amount of the bid from the time of the sale to the time the appeal is finally determined.

3. DAMAGES—*when alleged loss of interest is in the nature of damages.* Alleged loss of interest on redemption money from the time it was paid to the sheriff until the final determination of an appeal from an order denying a motion to set aside the sale, pending which appeal the sheriff was restrained by an order of court from paying over the redemption money, is in the nature of damages, for the recovery of which the party sustaining the same must look to the security afforded by the bond filed when the appeal was allowed and the restraining order entered.

APPEAL from the Superior Court of Cook county; the Hon. M. KAVANAGH, Judge, presiding.

DAVID K. TONE, and THOMAS J. SUTHERLAND, for appellants.

BARKER, CHURCH & SHEPARD, (WILLIAM T. CHURCH, of counsel,) for appellee Isidora Schmitt.

F. J. CANTY, and AMERICUS B. MELVILLE, (H. E. LONG, of counsel,) for appellees the International Packing Company and Thomas E. Barrett, sheriff.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

Isidora Schmitt, one of the appellees, filed her bill of complaint in the superior court of Cook county, praying that court to set aside as a cloud upon her title a certificate of sale of premises owned by her, issued to Charles F. Wenham, one of the appellants, on a sale under an execution in favor of John Cichowicz against the International Packing Company, one of the appellees. The bill was afterward amended so as to allege that the International Packing Company had redeemed the premises from the sale in accordance with the provisions of the statute. Charles F. Wenham, after demurring to the amended bill, answered the same and filed his cross-bill against appellees, Isidora Schmitt, the International Packing Company and Thomas E. Barrett, sheriff, asking the court to set aside the sheriff's certificate of redemption from said sale, to declare him the absolute owner of the premises and to order the sheriff to execute a sheriff's deed to him. The cross-bill was amended and appellees demurred to it. Zaidah E. Wenham, the other appellant, upon leave granted, filed a supplemental bill, alleging that Charles F. Wenham had conveyed to her all his right, title and interest in the premises, and asking to be substituted as complainant in the cross-bill. The court sustained the demurrers of appellees to the cross-bill and supplemental bill, and ap-

pellants having elected to stand by their cross-bill and supplemental bill, the same were dismissed for want of equity. The original bill was then dismissed on motion of the appellee Isidora Schmitt. Appellants appealed from the decree dismissing the original bill and the cross-bill and supplemental cross-bill.

The sole question in this case is whether the payment by the execution debtor, the International Packing Company, to the sheriff, within twelve months from the date of the sale, of the sum of \$3169.40, the amount of the sale with six per cent interest thereon, in accordance with the statute, was a legal redemption from the sale. The facts alleged upon which the court held that the redemption was legal and valid are as follows: The sale was made by the sheriff on July 15, 1902, to the appellant Charles F. Wenham for \$2990, and on July 23, 1902, a certificate of sale was made and delivered to him by the sheriff. On January 22, 1903, Isidora Schmitt filed her bill to set aside the certificate of sale. On May 4, 1903, the International Packing Company, defendant in the execution under which the sale was made, presented its motion to the superior court of Cook county from which the execution issued, for an order setting aside the execution, levy, sale and certificate of sale. The court denied the motion and the International Packing Company prayed an appeal, which was allowed upon filing a bond in the sum of \$4000, conditioned to pay to plaintiff, Cichowicz, and to Charles F. Wenham, the purchaser at the sale, all damages they or either of them might sustain by the staying of proceedings in said cause. The bond was given in compliance with the order and was approved by the court, and the sheriff was restrained by order of the court on July 1, 1903, during the pendency of the appeal, from issuing any sheriff's deed, and, in case of redemption, from paying over to any person the redemption money until the decision of the cause upon appeal, and Charles F. Wenham was also restrained from taking out any sheriff's deed, based upon

said sale, until such decision. On July 13, 1903, the International Packing Company paid to the sheriff \$3169.40 to redeem the premises from the sale, and that was the full amount required by the statute to effect a redemption. The sheriff issued a certificate of redemption as required by the statute and it was recorded in the recorder's office. The Appellate Court reversed the order of the superior court, but the judgment of the Appellate Court was reversed and the order of the superior court was affirmed by this court. *Wenham v. International Packing Co.* 213 Ill. 397.

The facts stated in the cross-bill to which the demurrer was sustained show that the redemption was made within the time and in the manner prescribed by the statute and with the proper officer; that the amount paid was sufficient to effect the redemption, and that a certificate evidencing the redemption was given and recorded in the recorder's office. The ground upon which counsel for appellants contend that the redemption was not effectual is, that the superior court, on motion of the International Packing Company, had restrained the sheriff, during the pendency of the appeal, from paying over the redemption money to the purchaser, so that he could not obtain the redemption money at once. The right to redeem property sold upon execution is given and regulated by statute, and the provisions of the statute having been complied with, the property was redeemed from the sale and freed from any claim of the purchaser. If he was entitled to receive the redemption money at once and was deprived of that right it was through the order of the superior court, and the legality of the redemption was not affected thereby. The redemption money was paid to the sheriff without any condition whatever, and his certificate recited that it was paid for the benefit of the purchaser. The fact that the court, on motion of the International Packing Company, had entered an order restraining the sheriff from paying over the redemption money until the determination of the appeal, does not in any manner affect the question

whether there was a redemption. Counsel for appellants argue that a payment of money under similar circumstances would not constitute the payment of a debt or obligation or a legal tender of payment, but the question what will constitute a redemption under the statute is not to be confused with either payment or tender. The only question is whether the statute was complied with.

Counsel for appellants further contend that the redemption was not valid because, when the appeal was finally determined in this court, the money in the sheriff's hands was not equal to the amount of the bid, with six per cent interest thereon to the time of such final determination. They treat the case as though the payment to the sheriff was an attempt to redeem at the time of the final determination of the appeal in this court, and that interest at six per cent from the time of the sale up to such final determination would be necessary to effect such a redemption. That position is not correct, but, on the contrary, when the appeal was finally decided the time for redemption had expired, and neither the packing company nor its grantee, Isidora Schmitt, would then have been entitled to redeem upon the payment of any sum of money. Interest on the redemption money after it was deposited with the sheriff could not be considered as redemption money or any part of it. The packing company was not bound to allow the time for the redemption to expire while litigating the question whether the purchaser was entitled to receive the redemption money, and interest on the money while the purchaser was deprived of its use is in the nature of damages. It could not be added to the amount paid to the sheriff for the purpose of invalidating a redemption lawfully made. If the purchaser suffered any damage by the loss of interest he can only be reimbursed by the security afforded by the bond filed in pursuance of the order of court and conditioned to pay him all such damages. After the redemption he had no right to the land or to a deed, but his right was to receive the money. If he suffered any

damage it was because of the restraining order, and the bond was given to secure payment of such damage.

Counsel for appellants liken this case to that of *Lynch v. Burt*, 132 Fed. Rep. 417, where a cross-bill was filed to set aside certificates of sale and the amount required to redeem was deposited in court. The statute provided for a redemption by the payment of redemption money to the sheriff, but the statutory right of redemption was not exercised. No money was paid to the sheriff for the purpose of redeeming the property, nor was it paid to any one authorized by the statute to receive it. There was no redemption in that case, and the court so held; but in this case there was a redemption in strict compliance with the statute.

The superior court did not err in sustaining the demurrers and dismissing the bills of appellants nor in dismissing the original bill of appellee Isidora Schmitt.

The decree is affirmed.

Decree affirmed.

THE PEOPLE *ex rel.* John J. Hanberg, County Treasurer,

v.

H. COHEN *et al.*

Opinion filed December 20, 1905—Rehearing denied Feb. 7, 1906.

1. RES JUDICATA—*when judgment of Supreme Court is not res judicata.* A judgment of the Supreme Court reversing a judgment of sale for the first installment of a special assessment upon the ground that on the record then before the court there had not been a substantial compliance with the terms of the ordinance, and remanding the cause generally, is not *res judicata* on application for judgment of sale for the second installment under a different record.

2. CONSTITUTIONAL LAW—*what is due process of law.* An orderly proceeding wherein a person is served with notice, actual or constructive, and has an opportunity to be heard and to enforce and protect his rights before a court having power to hear and judicially determine the case, is due process of law.

3. SAME—*when denial of right to appeal or writ of error does not affect validity of statute.* The fact that the right of appeal or writ of error in a purely statutory proceeding is denied by the express terms of the act does not affect the validity of the statute.

4. SPECIAL ASSESSMENTS—a judgment under section 84 of the *Improvement act* is *res judicata*. A judgment of the county court under section 84 of the Local Improvement act, after notice to the property owners, approving the certificate of the board of local improvements that an improvement has been completed in substantial compliance with the terms of the ordinance, is *res judicata* of that question in a subsequent proceeding to collect the assessment.

APPEAL from the County Court of Cook county; the Hon. ORRIN N. CARTER, Judge, presiding.

ROBERT REDFIELD, and FRANK JOHNSTON, Jr., (JAMES H. LEWIS, Corporation Counsel, of counsel,) for appellant.

GEORGE W. WILBUR, for appellees.

Mr. JUSTICE BOGGS delivered the opinion of the court:

This was an application of the county treasurer and *ex officio* county collector of Cook county for a judgment and order of sale for a delinquent second installment of a special assessment for curbing, grading and paving with granite blocks South Canal street from West Harrison street to the north line of the right of way of the Chicago, Burlington and Quincy railroad on Lumber street, warrant No. 31,183. The appellees objected to the application on the grounds, among others, (1) that the county court had no jurisdiction herein for the reason that the subject matter of the said application has been fully and finally determined by this court against the petitioner; and (2) that the improvement as constructed is other and different from the one described in the ordinance which is the basis of this application.

Upon the hearing the court admitted in evidence, over the objection of the appellees, the certificate of the board of

local improvements showing a statement of the cost of the improvement and that the improvement had been completed in substantial compliance with the ordinance, and also an order entered in the county court, after giving the notice required by the statute, approving and confirming such certificate. The court permitted the appellees, over the objection of the appellant, to introduce evidence tending to show a variation between the improvement as completed and the provisions of the ordinance. Over the objection of the appellees the appellant introduced evidence for the purpose of showing a substantial compliance with the ordinance. After the hearing the court entered an order sustaining the objections interposed by the appellees, and this is an appeal from such order and judgment.

The appellees urge in support of their first objection that the question whether the improvement as completed was in substantial compliance with the provisions of the ordinance was *res judicata*, having been finally determined by the decision of this court in *Eustace v. People*, 213 Ill. 424, which involved the collection of the first installment of the assessment for the same improvement. In that case we held that upon the record then before us, in making the improvement there had not been a substantial compliance with the terms of the ordinance, but the judgment in the case was reversed and the cause remanded generally. We do not agree with the contention of appellees that the decision in said case is *res judicata*. An order of this court reversing a judgment and remanding the cause generally has the effect only of a final judgment upon the facts then in the record, but the parties are not estopped thereby from introducing further evidence tending to prove or disprove the issues as joined after the re-instatement of the cause. (*In re Estate of Maher*, 204 Ill. 25; *Illinois State Trust Co. v. St. Louis, Iron Mountain and Southern Railway Co.* 217 id. 504). The record now before us is not the same as was the record in the *Eustace case*, *supra*. In the *Eustace case* the record did not con-

tain a certificate of the board of local improvements certifying that the improvement had been completed in substantial compliance with the requirements of the ordinance or the order of the county court approving and confirming the same after a hearing in that court, as does the record in the case at bar. (See opinion on rehearing in *Eustace case*.)

Under the view we take of this case it will not be necessary to consider the second ground of objection urged by appellees,—that it appeared from the testimony introduced herein that the improvement was not constructed in substantial compliance with the provisions of the ordinance.

This brings us to the consideration of the contention of the appellant that the certificate of the board of local improvements showing the cost of the improvement and a recitation that the ordinance had been substantially complied with in making the improvement, and the order of the court approving and confirming the same, entered after notice and a hearing, are *res judicata* of the question of fact approved and confirmed by said order.

The appellees intimate in their brief that section 84 of the Local Improvement act, authorizing the action of the board of local improvements and that of the county court in approving and confirming the same, is unconstitutional, in that, as they contend, it deprives the property owners of their property without due process of law. This section 84 provides that the property owners shall be notified of the filing of the certificate, and of the time and place of hearing the same, by publication and posting of notices; that objections may be filed to the approval of the certificate of the board of local improvements by such property owners within a time specified in the act; that a trial shall be had before the court, and that the court shall judicially hear and determine the issues in a summary manner, and that the order of the court shall be conclusive on all parties. An orderly proceeding, where a person is served with notice, actual or constructive, and has an opportunity to be heard and to enforce

and protect his rights before a court having power to hear and judicially determine such case, is due process of law. (8 Cyc. 1082.) The denial of the right of appeal or of the right to sue out a writ of error in a statutory proceeding can not affect the validity of the statute. The right to prosecute an appeal from the judgment of a trial court is purely statutory, (*Lingle v. City of Chicago*, 210 Ill. 600,) and in statutory proceedings, such as the case at bar, a writ of error is not a writ of right where the legislature has seen fit to provide otherwise. (*Hart Bros. v. West Chicago Park Comrs.* 186 Ill. 464.) One of the principal issues below, and which, when settled, would be decisive of the case, was whether or not there had been, in the construction of the improvement, a substantial compliance with the terms of the ordinance. The contention of the appellant is that that issue had been decided by the county court, and that it was proper for the court to admit in evidence the record of the proceedings in the county court tending to prove that issue. A judgment or order of the county court on that question having been entered, which judgment or order was by the statute made final and conclusive, was a judicial determination of the question and was *res judicata*, and could not be raised again in a collateral proceeding.

The record of the filing of the certificate of the board and the order of the court confirming the same were properly received in evidence.

The judgment of the county court must be and is reversed, and the cause will be remanded to that court with directions to enter a judgment and order of sale in conformity with the application.

Reversed and remanded, with directions.

J. HENRY KRAFT

v.

THE WEST SIDE BREWERY COMPANY.

Opinion filed December 20, 1905—Rehearing denied Feb. 7, 1906.

CORPORATIONS—when a mortgage loan taken by brewery is not *ultra vires*. Loaning money, secured by mortgage, to enable the borrower to erect a building for a saloon and hall in which no beer other than that manufactured by the lender should be sold is within the power of a brewing corporation, as being a legitimate effort to extend the sale of its product, and the defense of *ultra vires* cannot be sustained to a bill to foreclose the mortgage.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding.

I. T. GREENACRE, (EMIL A. MEYER, of counsel,) for appellant.

WINSTON, PAYNE & STRAWN, (MATT B. PITTMAN, of counsel,) for appellee.

Mr. JUSTICE HAND delivered the opinion of the court:

This was a bill filed in the superior court of Cook county to foreclose a mortgage given by appellant to appellee upon certain real estate located in the city of Chicago, to secure the payment of appellant's promissory note for the principal sum of \$4000, together with ten interest notes. A decree of foreclosure was entered by the trial court, and an appeal was taken to the Appellate Court for the First District, where the decree of foreclosure was affirmed, and a further appeal has been prosecuted to this court.

The only substantial defense urged by appellant was that of *ultra vires*. It appears from the evidence that appellant was the owner of a lot at the corner of Diversey and Wash-

tenaw avenues, located just outside of the temperance district of Chicago; that an agent of appellee suggested that it might be of mutual advantage to appellant and appellee if appellant would erect a building suitable for saloon and hall purposes upon this lot; that soon thereafter appellant submitted a plan of a building containing a saloon and apartments for the saloon-keeper on the first floor and a hall on the second floor, to appellee, which plan it approved, and agreed to loan appellant \$4000 to be used in erecting such building provided it should be given a lease thereon, and that no beer other than that manufactured by appellee should be sold on said premises during the term of said lease. The building was erected in accordance with said agreement and appellant for a period paid the interest on said loan as it fell due. Failing eventually to comply with the terms of said mortgage this bill was filed to enforce its provisions, and appellant seeks to avoid the effect thereof by asserting that appellee has gone beyond its charter powers in making said loan, and that the taking of the mortgage was *ultra vires* and it is therefore wholly void.

Appellee is a corporation organized under the laws of this State, the object of its organization being "the brewing and selling of beer," and it is clear that it had no power to engage, generally, in the business of loaning money. The only question open to discussion is whether the nature of this transaction was within such prohibition. From a careful consideration of the evidence we are of the opinion it was not. A corporation may, for the purpose of advancing the objects and purposes for which it was created, do many acts which, except for their bearing upon the express powers of the corporation, would be *ultra vires*. The following rule was approved in *Best Brewing Co. v. Klassen*, 185 Ill. 37: "In exercising powers conferred by its charter, a corporation 'may adopt any proper and convenient means tending directly to their accomplishment, and not amounting to the transaction of a separate, unauthorized business.'" In that case

this court held it to be beyond the power of a corporation organized for the same purpose as appellee, to sign an appeal bond with a third party in a case in which it had no direct interest. In the case of *Central Lumber Co. v. Kelter*, 201 Ill. 503, it was held to be within the implied power of a corporation organized for "the purchase and sale of lumber, and all adjuncts for carrying on a general lumber business," to sign a bond for the performance of a building contract as surety with the contractor, who, by reason thereof, purchased the lumber used in the building, of said company, for the reason that the signing of said bond tended directly to promote the sale of lumber, one of the purposes within the charter of the corporation.

We are of the opinion that the loan in this case was within the implied powers of appellee, and made for a purpose not too remotely connected with the promotion of its business to be within the rule laid down in *Central Lumber Co. v. Kelter*, *supra*. The reason for making the loan can under no construction of the facts be held to have been for the purpose usually in view in making real estate loans,—that is, safe security at a satisfactory rate of interest. The testimony of appellant shows that he was the owner of a lot advantageously located for a saloon and hall, and that appellee solicited him to put the same to that use, and agreed to furnish the funds for the erection of the desired building provided it was given the exclusive sale therein of the beer of its manufacture. We are of the opinion that the appellee's motive was clearly to extend the sale of its product and not to engage in the business of loaning money, and that such would be a legitimate result of the transaction, and this being its purpose, the making of said loan cannot be held to have been *ultra vires*. Therefore the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

JACOB GLOS *et al.*

v.

JENNIE G. GARRETT.

Opinion filed December 20, 1905—Rehearing denied Feb. 7, 1906.

1. EVIDENCE—*party not entitled to cross-examine counsel who made affidavit for introducing copy of deed.* Where an affidavit for the introduction of a certified copy of a deed is positive in its terms and meets all the requirements of the statute, the opposite party is not entitled to cross-examine the affiant as to the truth of the affidavit.

2. SAME—*what is not a variance.* Where a bill to remove a cloud alleges that complainant is the owner of the premises in fee simple, an allegation that she derived her title by a deed from a certain person and his wife is superfluous; and where the deed offered in evidence is objected to because of lack of evidence of the official character of the notary who took the wife's acknowledgment to the deed in a foreign State, the deed may be given in evidence as the deed of the husband alone, without creating a material variance.

3. CLOUD ON TITLE—*when allegation of ownership is sustained.* In a proceeding to remove a cloud from title, proof of a warranty deed to complainant, coupled with proof that at the time the bill was filed persons living in a house on the premises were paying rent to the complainant, is sufficient proof of complainant's allegation of ownership.

4. SAME—*re-imbursement is a condition precedent to relief in setting aside a tax deed.* It is a condition precedent to relief in a proceeding to set aside a tax deed as a cloud upon title, that the complainant shall re-imburse the holder of the deed for moneys expended, with interest thereon.

5. TENDER—*tender before suit begun is essential to decreeing costs against the holder of tax deed.* To justify decreeing the costs against the holder of the tax deed sought to be set aside as a cloud, the complainant must, before commencing suit, tender the whole amount paid at the tax sale, with subsequent taxes, costs and interest, and keep such tender good by bringing the money into court.

6. SAME—*when tender is sufficient to justify apportioning costs.* In a proceeding to set aside a tax deed and a quit-claim deed to an undivided one-third interest in the premises, if the holder of the quit-claim deed is represented by counsel at the hearing before the master, an offer made to her counsel before the hearing to pay the amount due her, coupled with the fact that the money is left

with the master and brought into court on refusal of counsel to accept it, is sufficient tender to justify the court in requiring her to pay one-third of the master's charges.

7. VENUE—*what is reasonable notice of a change of venue is largely discretionary with the judge.* The obligation of a judge to grant a change of venue to one who brings himself within the provisions of the statute is imperative; but the statute requires reasonable notice, and what is reasonable notice in a particular case must be left to the judge to whom the application was made, and that discretion will not be interfered with on appeal unless abused.

APPEAL from the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding.

JACOB GLOS, *pro se*; JOHN R. O'CONNOR, for appellant
Emma J. Glos.

ALFRED E. HOLT, and WILLARD D. NORTON, (OTIS H. WALDO, of counsel,) for appellee.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

The superior court of Cook county entered a decree upon a bill filed by the appellee, Jennie G. Garrett, setting aside a tax deed of premises in said county to the appellant Jacob Glos and a quit-claim deed of an undivided one-third of said premises from him to the appellant Emma J. Glos, and requiring Jacob Glos to pay two-thirds of the master's charges upon a reference and Emma J. Glos to pay one-third.

Appellants contend that there was no competent evidence that appellee owned the premises at the time the bill was filed. The evidence of title consisted of a certified copy of a warranty deed from Jonathan Pettet and wife to appellee, and proof of possession. The solicitor for appellee made an affidavit, in compliance with the statute, for the purpose of introducing a certified copy of the record. Appellants asked the privilege of cross-examining the maker of the affidavit as to its contents, and the request was denied. The solicitor

testified generally in the case, but the proposed examination would not have been cross-examination as to anything he testified to as a witness. The affidavit was positive in its terms and met all the requirements of the statute, and appellants were not entitled to cross-examine the maker of it as to its truth. The certified copy of the record showed that the deed was acknowledged by the wife before a notary public in the State of Ohio, and it was objected to for want of evidence of his official character. It was then offered as a deed of Jonathan Pettet alone, and it is insisted that this created a variance between the allegations of the bill and the proof. The averments of the bill were that appellee was the owner of the premises in fee simple and was in possession and derived her title by a deed from Jonathan Pettet and wife. The description of the deed was superfluous and there was no variance in any material matter. The evidence of possession was, that when the bill was filed the premises were improved by a two-story frame house, which was in the possession of two persons, who were paying rent at \$30 a month to appellee. They were her tenants and their possession was her possession. The possession in connection with the warranty deed was sufficient to support the allegation of ownership for the purpose of removing a cloud from the title.

It is also contended that the court erred in requiring Emma J. Glos to pay one-third of the master's charges. Where a bill is filed to set aside a tax deed it is a condition precedent to the relief that the complainant shall reimburse the holder of the deed for moneys expended, with interest thereon. If a complainant in such a case desires to place the owner of the tax title in the wrong, he must, before commencement of the suit, tender the whole amount paid at the tax sale, with subsequent taxes, costs and interest, and keep such tender good by bringing the money into court, and if he fails to do so costs cannot be decreed against defendants. (*Gage v. Arndt*, 121 Ill. 491; *Mccartney v. Morse*, 137 id.

481; *Cotes v. Rohrbeck*, 139 id. 532; *Gage v. Goudy*, 141 id. 215; *Glos v. McKeown*, id. 288.) The bill alleged that appellee had tendered to appellants all the money, taxes and costs, with legal interest thereon, which they had expended, and that they had refused to accept the same. The bill also alleged that the appellee was ready and willing, and thereby offered, to pay them whatever equity might require. At the hearing it was proved that a tender had been made to Jacob Glos of \$36.24, two-thirds of the amount necessary to entitle appellee to have the tax deed removed as a cloud. There had been no tender to Emma J. Glos, but at the first hearing before the master \$21.12 was offered to her solicitor for one-third of the amount necessary to satisfy the claim for reimbursement, together with all the costs incurred by her up to that time. At the same time an offer was made to pay the amount previously tendered to Jacob Glos, but the moneys were not accepted and were left with the master and brought into court. It is urged that the tender was insufficient to charge Emma J. Glos with costs for the reason that she was not present, and that a solicitor has no authority, by virtue of his employment, to accept money in such a case. The cause was on hearing before the master, where Emma J. Glos appeared by her counsel, and we regard the offer to pay her the amount due at such hearing as sufficient. Ordinarily an attorney has a right, without proof of special authority, to receive and receipt for the amount due his client. Although it is necessary, in order that the costs of the suit may be decreed against the defendant, that a tender shall be made before the filing of the bill, it was held in *Glos v. Stern*, 213 Ill. 325, that a refusal by a defendant to accept a tender of all that he is entitled to after the suit is commenced will justify a court in making an apportionment of the costs and requiring him to pay such costs as are occasioned by his wrongful refusal. The court would not be justified in practically accomplishing the same result in such a case as in a case where a tender is made before suit, un-

der the pretext of apportioning costs, and we would not be ready to establish a rule that a complainant might at any time during the progress of the hearing make a tender of the amount due and require the other party to pay the subsequent costs. But this tender was made before the proceedings on the reference began, and the apportionment was not unreasonable.

Appellants also insist that the court erred in denying their petition for a change of venue and in setting aside one of the rules of the court, and that there was an abuse of discretion in both instances. The proceedings in the cause had been before another judge of the superior court, and on July 6, 1905, notice was given to the solicitor for the appellants that exceptions to the master's report would be called up on Monday, July 10, before the judge who heard the exceptions and entered the decree. Appellants had filed objections to the report before the master and they were overruled on March 15, 1904. The report had remained with the master for one year and three months thereafter, during which time no action had been taken in the case. On July 10 the solicitor for appellants appeared in court and stated the circumstances of the case and that he was engaged in another court, whereupon he was ruled to file exceptions to the report by Wednesday morning of that week, at ten o'clock. He then stated that he should probably ask for a change of venue, and that they had been trying to agree upon another judge to hear the case, and gave verbal notice of the intended application to opposing counsel. From that point the contest appears to have been between the judge and appellants, and the certificate of evidence shows that the following proceedings then took place: The judge ordered the case to proceed at once and the solicitor asked for time to file exceptions, whereupon he was ruled to file them *instanter*. The solicitor invoked the rule that under that order he had all of the day until the adjournment of the court to file his exceptions, but the judge said that *instanter* meant at once, and

he could sit down there and write his exceptions. The judge set aside the order giving until Wednesday morning at ten o'clock to file exceptions, but upon counsel for appellee conceding that the solicitor was actually engaged in empaneling a jury in another court, which he had left to attend to this matter, an order was entered allowing him to file exceptions by ten o'clock the next morning. At that time the solicitor presented a petition of the appellants for a change of venue. It was in all respects in compliance with the statute, but the judge ruled that the notice given the day before was insufficient, denied the petition and ordered the case to proceed at once. The rule to file exceptions had been complied with, and the solicitor for appellants then insisted upon a compliance with the rules of the court by which the hearing of exceptions to masters' reports were to be put on the contested motion calendar. The court denied the motion under a rule for emergency matters, on the ground that the time for redemption from a foreclosure sale of the premises would expire in the following September. The solicitor being still engaged in the trial of a case in another court which he had left temporarily, asked for further time, but the court ordered him to proceed at once, and upon the exceptions being read, overruled them and entered the decree.

The obligation of a judge to allow a change of venue to one who brings himself within the provisions of the statute is imperative and admits of the exercise of no discretion. (*Clark v. People*, 1 Scam. 117.) But the statute requires reasonable notice, and what is reasonable notice in a particular case must be left to the discretion of the judge to whom the application is made, and that discretion will not be interfered with unless abused. (*Berry v. Wilkinson*, 1 Scam. 164.) The cause had not previously been on the calendar of the judge who heard it, but appellants had received notice on July 6 that the exceptions would be called up before him on July 10. We cannot say that it was an abuse of discretion on the part of the court to hold that notice for one day

under such circumstances was insufficient, and the same must be said of the decision that there was an emergency justifying the setting aside of the rule of the court. The emergency was not great, as the time for redemption did not expire until some time in September, but the matter was so largely in the discretion of the court that we are not disposed to reverse the decree on that account.

The tax-deed was clearly invalid and there was no meritorious defense to the bill. No other result as to the merits could have been reached, and upon a consideration of the whole case the decree is affirmed.

Decree affirmed.

THE CHICAGO AND JOLIET ELECTRIC RAILWAY COMPANY

v.

NANCY J. PATTON.

Opinion filed December 20, 1905—Rehearing denied Feb. 7, 1906.

1. EVIDENCE—*when refusal to strike out answer is not reversible error.* Refusal to strike out the answer, "I have been a nervous wreck ever since," to a question put to the plaintiff as to her physical condition since the injury for which she is seeking to recover damages, is not reversible error, where there is other and ample evidence in the record to show her physical condition.

2. INSTRUCTIONS—*when instruction does not assume to direct a verdict without proof of injury.* An instruction stating that the questions involved, as alleged in the declaration, of negligence by the defendant, if any, and reasonable care by plaintiff, if any, "are what are known as questions of fact, which it is the duty and province of the jury to determine under the law and the evidence in the case," does not assume to summarize the elements of recovery and direct a verdict without proof of the fact of the injury.

3. SAME—*when instruction does not submit question of law to the jury.* An instruction telling the jury that if they believe, from the evidence, that the plaintiff has proved the allegations contained in one or more counts of the declaration by a preponderance of the evidence she is entitled to recover, is not erroneous as submitting a question of law to the jury.

4. APPEALS AND ERRORS—*question whether verdict was excessive is not open to review in Supreme Court.* Whether the verdict in an action for personal injury was excessive is a question of fact, upon which the judgment of the Appellate Court is conclusive.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Will county; the Hon. DORRANCE DIBELL, Judge, presiding.

E. MEERS, (E. C. HALL, of counsel,) for appellant.

JOHN W. D'ARCY, for appellee.

Mr. JUSTICE HAND delivered the opinion of the court:

This is an appeal from a judgment of the Appellate Court for the Second District affirming a judgment of the circuit court of Will county for \$6000 in favor of appellee, in a suit brought to recover damages for an injury she is alleged to have received while leaving one of appellant's cars in the city of Joliet. The evidence introduced by appellee tended to show that the car was stopped for the purpose of allowing passengers to alight, and that while she was attempting to leave the car it was suddenly and violently started forward without notice or warning, thereby throwing her to the pavement and injuring her side and hip severely, which injury was permanent in its nature.

At the close of all of the evidence appellant moved the court to instruct the jury to find for the defendant, and at the same time presented an instruction to that effect, which motion was overruled and the instruction refused, and this action of the trial court has been assigned as error. The motion made and the instruction offered raised the question, as a matter of law, as to whether there was any evidence before the court fairly tending to support the case made by the plaintiff's declaration. We are of the opinion that there is ample evidence in the record fairly tending to make a case for appellee. In fact, appellant's argument upon this assign-

ment of error is largely a discussion of the weight of the evidence and the credibility of the witnesses,—questions upon which the judgment of the Appellate Court is conclusive and which this court is not permitted to consider. The trial court properly refused to take the case from the jury.

It is next contended that the court erred in refusing to strike from the record an answer to a question, upon direct examination, interrogating appellee as to her physical condition since the injury. The answer was, "I have been a nervous wreck ever since." The answer was more a statement of a conclusion than a statement of fact. There is, however, ample evidence in the record to show the condition of appellee's health since the injury, and the jury saw and heard her testify and had opportunity to observe her condition, and could not have been misled by the foregoing statement. The refusal of the trial court to strike such answer from the record was not such error as should work a reversal of this case. *Chicago City Railway Co. v. Saxby*, 213 Ill. 274.

It is next objected that the trial court erred in giving two instructions for appellee. The first was as follows:

"The court instructs the jury that the questions involved herein, as alleged in the plaintiff's declaration, of negligence on the part of the defendant, if any, and the exercise of reasonable care on the part of the plaintiff, if any, are what are known as questions of fact, which it is the duty and province of the jury to determine under the law and the evidence in the case."

It is contended that this instruction is defective, in that it attempts to summarize the facts necessary for the plaintiff to prove in order to entitle her to recover but does not require her to prove she was injured. The instruction, in the opinion of the court, does not assume to point out the elements of proof necessary to a recovery and direct a verdict, but merely informs the jury that two of the elements in the case, those of due care and negligence, are questions of fact

for their determination under the law and the evidence, and is within the rule stated in *West Chicago Street Railroad Co. v. Schultz*, 217 Ill. 322, where, at page 325, it was said: "In framing instructions it is not ordinarily required that any one instruction should state all the law of a case, but if an instruction is correct so far as it goes, and does not assume to point out all the elements of proof necessary to a recovery and direct a verdict, it may be supplemented by other instructions, and omissions therefrom may be supplied by other instructions." Taking the instructions in this case as a series, the question of the injury to appellee was fully presented to the jury as an element that must be proved before she could recover.

The second instruction is as follows:

"If the jury believe, from the evidence, that the plaintiff has proved the allegations contained in one or more counts of her declaration by a preponderance of the evidence, and if the jury believe, from the evidence, that the plaintiff was injured as therein alleged, and if the jury believe, from the evidence, that the plaintiff, at the time of such injury, was in the exercise of reasonable care for her safety, and if you further believe, from the evidence, that such injury, if proved, was caused by or through the negligence of the defendant, as alleged in such count of the declaration, then the plaintiff is entitled to recover such damages as you believe, from the evidence, will compensate her for the injury sustained."

It is objected that the first clause of the instruction submits a question of law to the jury. This court has repeatedly held that an instruction telling the jury that if they believe, from the evidence, the plaintiff has proved his or her case as laid in his or her declaration they will find the issues for the plaintiff, not to be objectionable. *Mt. Olive and Staunton Coal Co. v. Rademacher*, 190 Ill. 538; *Central Railway Co. v. Bannister*, 195 id. 48; *West Chicago Street Railroad Co. v. Lieserowitz*, 197 id. 607.

It is further objected that the subsequent clauses of said instruction fail to instruct the jury as to the degree of proof required to establish plaintiff's case. In *Village of Altamont v. Carter*, 196 Ill. 286, in passing upon a similar objection, it was said: "A requirement in the first part of an instruction that the jury must base their findings upon the evidence applies and extends to all subsequent clauses in the instruction, and it is unnecessary in each of the succeeding sentences to inform the jury that they must find from a preponderance of the evidence." The objections urged as to the second instruction are not well taken.

The last assignment of error is that the verdict is excessive. That question was one of fact, conclusively settled by the judgment of the Appellate Court. *City of Elgin v. Nofs*, 212 Ill. 20.

A careful consideration of all errors assigned by appellant fails to disclose any error which would justify a reversal of this case. The judgment of the Appellate Court will therefore be affirmed.

Judgment affirmed.

CLYDE D. LEE *et al.*

v.

MARIA LOMAX.

Opinion filed December 20, 1905—Rehearing denied Feb. 7, 1906.

EVIDENCE—*testimony of attorneys as to the reasonableness of charges is not binding on the court.* Testimony of attorneys as to the reasonableness of another attorney's charges is in the nature of opinions and is not binding upon the court. .

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. R. S. TUTHILL, Judge, presiding.

J. S. McCLURE, for appellants.

VAIL & PAIN, for appellee.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

Appellee, Maria Lomax, filed her bill in the circuit court of Cook county against appellants, Clyde D. Lee, Bernard L. Lee and F. B. Schuchardt, a firm of attorneys, to compel the surrender of her papers, upon which they claimed a lien for attorneys' fees, and for an accounting, and to enjoin them from prosecuting a suit against her for such fees. The defendants answered, admitting that they had acted as the complainant's attorneys, claiming that she was largely indebted to them for legal services, and alleging that they had rendered a bill to her for \$1400 for fees and had commenced a suit at law to compel payment. A replication having been filed, the cause was referred to a master in chancery. Complainant's claim on the accounting before the master consisted of a promissory note upon which there was \$312.84 due and which was not in dispute. Defendants' account presented to the master consisted of three charges: one of \$750 for two suits commenced against the Chicago Consolidated Bottling Company for rent, upon which charge \$200 had been paid; \$500 for examining titles and preparing to begin a suit for partition, and \$50 for placing two children in an orphans' home. The amount claimed to be due on these three charges was \$1050, and that was the amount in controversy in the suit. The master gave defendants credit for the charge of \$50 for placing the children in the orphans' home, and no objection or exception to that allowance was filed by the complainant. The master disallowed the other items, and after deducting \$50 from the amount due on the note, reported a balance due complainant of \$262.84. The court sustained exceptions of the defendants to the report,

and allowed to them for fees the exact amount due on the note so as to balance the accounts, and ordered the note canceled and the costs equally divided between the parties. The complainant appealed to the Appellate Court, and that court reversed the decree and remanded the cause, with directions to overrule the exceptions to the report of the master and to enter a decree in accordance with the report and for costs of the suit.

After the death of her husband complainant employed defendants as her attorneys to attend to her interests, and they acted as such from December 18, 1899, until discharged. She made frequent payments to them of various amounts for their services, for which they gave receipts, amounting in all to \$853.25 up to February 15, 1902. The receipts given on the 15th days of September, October, November and December, 1901, and January and February, 1902, were in full for all services up to the dates of said receipts, respectively. After those receipts were given defendants commenced a suit for complainant in one of the courts of Cook county against the Chicago Consolidated Bottling Company for rent, and on March 13, 1902, she paid them \$100 and they gave her a receipt for their fee in the matter of the lease with said company and the suit to be instituted against said company for rent coming due. They commenced another suit in another court for the same subject matter, the only reason for which was, that having two suits the chances for an early trial would be better, and on May 28, 1902, the complainant again paid them \$100 and they gave her a receipt for that amount for their fee in the case. She discharged them in August, 1902. Mr. Clyde D. Lee then stated that defendants had been paid in full for their services and that complainant did not owe them anything.

The fees for which the charges were made were for alleged research and investigation of the law with reference to bringing the suit against the bottling company for rent, and the examination of abstracts and titles with a view to

commencing a partition suit. Two attorneys, with a complaisance not unusual in such cases, testified that the charges were not unreasonable and the services were worth somewhat more than the charges. Evidence of that kind is admissible, but it is in the nature of opinions and generally influenced by a desire to be obliging and to conform to the views and wishes of brother attorneys, and it is never binding on the court. Courts are entirely capable of forming and exercising an independent judgment on the question. The two suits had been instituted but no results had been obtained, and there was nothing in the question, which was the same in both suits, requiring any extended research. The \$200 paid for fees in those suits was ample compensation for all the services performed in relation to the rent or the suits. The charge of \$500 was of the most general character and there was nothing substantial about it. It was claimed that a great amount of time and labor had been expended in getting information and determining questions of law preparatory to bringing the suit. Defendants had been acting as attorneys for the complainant, and in doing so had informed themselves as to her property and estate and had been paid for it. They had given many receipts in full for all legal services up to the dates of such receipts, and when they were discharged they understood they had been paid in full for all their services. We are satisfied with the conclusions of the master and the Appellate Court on that question. The decree of the circuit court had no basis in the evidence, and the judgment of the Appellate Court reversing it was correct.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

APOLLONIA WARTH

v.

L. LOEWENSTEIN & SONS.

Opinion filed December 20, 1905—Rehearing denied Feb. 7, 1906.

1. APPEALS AND ERRORS—*whether there is any evidence to support defense is not preserved by motion for new trial.* Whether there is any evidence tending to support the defense to a suit at law is not preserved for review by the plaintiff's motion for new trial, where she submitted the case to the jury without moving to exclude the evidence, demurring thereto or asking a peremptory instruction in her favor.

2. EVIDENCE—*party may explain why witness was not produced.* Where a witness whom a party would be expected, under the circumstances, to produce is absent in Europe at the time of the trial, it is proper to permit the party to state why the witness went to Europe, in order to rebut any unfavorable inference or presumption which might otherwise arise from the fact he was not produced.

3. SAME—*what is not improper cross-examination.* It is not improper, on cross-examination, to permit the witness to be questioned as to certain statements made by him in his deposition taken prior to the trial but not introduced in evidence.

4. SAME—*when party cannot complain that jury took incompetent memoranda on retirement.* One who introduces a paper in evidence and obtains a ruling that certain memoranda on the back thereof should be excluded should erase or cover the memoranda, and cannot complain that the jury, on retirement, took the paper with the memoranda unerased.

5. COSTS—*when judgment against plaintiff for costs is improper.* A plaintiff who recovers a part, only, of her demand should not be adjudged liable for the costs, where the defense is the general issue, not limited, and no tender as to the part of the demand recovered is pleaded or kept good.

6. SAME—*tender after suit begun must include accrued costs.* Tender after suit begun, in order to avoid further costs, must include the costs of the suit incurred up to the time of the tender.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. CHARLES M. WALKER, Judge, presiding.

HELMER, MOULTON & WHITMAN, for appellant.

NEWMAN, NORTHRUP, LEVINSON & BECKER, (HARRY GOODMAN, ARTHUR B. SCHAFFNER, and CHESTER E. CLEVELAND, of counsel,) for appellee.

Mr. JUSTICE BOGGS delivered the opinion of the court:

This is an appeal perfected by the appellant, Apollonia Warth, trading as Albin Warth, from a judgment entered in the Appellate Court for the First District affirming a judgment of the circuit court of Cook county against the appellee corporation in her favor in the sum of \$87.50, and also entering judgment for the costs in that court against appellant. A certificate of importance was granted by the said Appellate Court.

The action was assumpsit by the appellant against the appellee, and the declaration contained four counts. The first count alleged that in April, 1895, appellant, at the request of appellee, a corporation, "licensed, let and delivered to use" to appellee a patented machine for cutting cloth, constructed under certain letters patent of the United States belonging to her, "under licenses, terms and conditions" which the count set out in full, and that the appellee agreed to pay \$150 semi-annually to the appellant. The seventh clause of said license is as follows: "The said licensees may terminate the payment of royalty herein mentioned upon the condition that the aforesaid machine shall be returned and delivered to said licensor by the said licensees with payment of royalty up to date of such return; and upon the further condition, and the said licensees agree, that they will not thereafter use or authorize, or allow to be used, directly or indirectly, in their business or elsewhere, any other cloth-cutting machine until all the patents herein mentioned shall have run out." This count alleges as the breach thereof that the appellee did not, after October 2, 1896, pay the semi-annual royalties for said machine, and that said appellee "never did, prior to the commencement of this suit, return the said machine, with payments of royalties up to

the date of such return, whereby," etc. The second count is the same, in substance, as the first, and the breach alleged is the failure to pay the semi-annual royalties due on April 2, 1897, and thereafter. The third and fourth counts are common counts for royalties unpaid. There is no averment in either of the counts that after the delivery of the machine to the appellee corporation the appellee used any other cloth-cutting machines, and thereby became liable to pay royalties.

To the declaration the appellee pleaded the general issue, verified by affidavit, and also a plea of the Statute of Frauds, which latter plea alleged that the supposed agreement of April, 1895, was not to be performed within one year, and that no note or memorandum of it was signed by the appellee. This latter plea was disposed of by a demurrer which was sustained thereto by the court. The defense was that the machine was re-delivered to the appellant and the royalties due to that date tendered to her. This defense was sustained and judgment in the sum of \$87.50 was entered in favor of the appellant, being the amount due for royalties to the date of the re-delivery of the machine to the appellant. The appellant contends there was no evidence tending to support this defense. No motion for a peremptory verdict in her favor was entered.

It is urged by the appellant that the question whether there was any evidence tending to support the defense was raised and preserved for review in this court by her motion for a new trial. We do not think this contention can be sustained. In support of this insistence counsel urge that *Reichwald v. Gaylord*, 73 Ill. 503, and *Geary v. Bangs*, 138 id. 77, so hold. We have examined both of those cases on this point, and find the holdings there to be, that the question whether the evidence is sufficient to sustain the verdict may be raised for review by a motion for new trial. But the question so preserved for review would be one of fact, cognizable only in the Appellate Court,—not a question of law for this court. In the latter of the cases cited we held that

the question whether there was any evidence to go to the jury was raised by the demurrer to the evidence on behalf of plaintiff, but that defendant did not abide the demurrer but introduced testimony to controvert plaintiff's evidence and did not renew the demurrer at the close of all the evidence, and thereby waived the right to raise the question, on appeal, as to whether there was any evidence tending to support the plaintiff's case.

In *Berriman v. Marvin*, 162 Ill. 415, we held the practice is settled that by submitting the case to the jury without a motion for a peremptory instruction, a motion to exclude the evidence or a demurrer to the evidence, the right to raise as a question of law whether there was any evidence tending to support the cause was waived. The appellant, by submitting the case to the jury without a motion to direct a verdict in her favor, must be held to have conceded that there was evidence tending to support the defense, and that question was not raised by the motion for a new trial. *Calumet Electric Street Railway Co. v. VanPelt*, 173 Ill. 70; *West Chicago Street Railroad Co. v. McCallum*, 169 id. 240.

The evidence disclosed that Emanuel Loewenstein was the president of the appellee corporation and the representative thereof with whom the negotiations leading up to the alleged contract were had, and that in November prior to the trial in March he went to Europe and was absent there at the time of the trial, and that his deposition had not been taken. It was insisted by appellant that the failure to produce Emanuel Loewenstein as a witness or to procure and present his deposition on the hearing justified the jury to infer that his evidence, if produced, would have been unfavorable to the cause of the appellee, and therefore appellant contends the giving of the following instruction in behalf of the appellee was error:

"The court instructs the jury that they should not draw any inference unfavorable to the defendant from the fact that Emanuel Loewenstein has not appeared as a witness in

this case on behalf of the defendant, if, from the evidence, the jury believe that said Loewenstein is unavoidably absent in Europe at the time of this trial."

The evidence for the appellant showed, and the brief of counsel for appellant here admits, that the only matter said Emanuel Loewenstein could have testified to, if present, was as to part of the negotiations had between Henry Warth, acting for appellant, and said Emanuel, acting for appellee, in reference to the alleged agreement of February, 1895. The verdict of the jury is consistent only with the view they found that the contract was made and entered into as claimed by the appellant, hence it is clear the instruction, whether accurate or not, did not produce any harmful result to the appellant.

It is insisted that the court erred in permitting the witness Sidney Loewenstein, over the objection of the appellant that it was immaterial, to state why his brother, Emanuel, had gone to Europe. We do not think this was error. The correct rule is stated as contended for by counsel for the appellant, that the mere withholding or failing to produce evidence which, under the circumstances, would be expected to be produced and which is available gives rise to a presumption against a party. (*Mantonya v. Reilly*, 184 Ill. 183.) But evidence may be given in behalf of the party who fails to produce such evidence to explain such failure, and thereby rebut any inference or presumption that might otherwise arise therefrom. (22 Am. & Eng. Ency. of Law,—2d ed.—1260.)

The contention of the appellant that the court erred in allowing appellee, on cross-examination of Charles Warth, over the appellant's objection, to question him as to certain statements made by the witness in his deposition taken prior to the trial but not introduced, is without merit. It is always proper, for impeaching purposes, to show that the witness has made prior inconsistent or contradictory statements on material points, and nothing more was done in this

instance. *Western Manufacturers' Mutual Ins. Co. v. Boughton*, 136 Ill. 317.

During the hearing a certain paper was introduced on behalf of appellant. On the back of the paper certain words were written with a pencil. On objection by appellant the court held the pencil memorandum was not proper to be admitted, and excluded the same. It is complained the jury took this paper, with the memorandum on it, together with other documents, to the jury room when they retired to consider of their verdict. This instrument of evidence was introduced by appellant, and the court, on her motion, ruled that the penciled words on the back were not proper to be received in evidence, and it was the duty of the appellant to have caused the words to be covered or erased. She cannot, therefore, be heard to complain that this was not done.

It is complained by the appellant that instruction No. 3 given at the request of the appellee ignored all right of the appellant to recover royalties by reason of the use of other machines than those patented by the appellant. The declaration, as we have seen, did not set forth any liability to pay royalties because of any breach in the contract not to use other machines than those patented by the appellant, and the pleadings presented for decision no such issue. Instruction No. 2 given at the request of the appellant presented the cause and the issues in the same manner as did the pleadings, and as also did instruction No. 3 given at the request of the appellee.

The judgment was in favor of the appellant in the sum of \$87.50, but it was adjudged that she should pay the costs. This order requiring the appellant to pay the costs was erroneous. The defense was that the appellee had re-delivered the machine to the appellant and at the same time tendered to her its check for \$87.50, the royalties which had accrued at the date of such re-delivery. Appellant refused to receive the sum so tendered and brought the action to recover the amount she claimed to be due. The appellee pleaded the

general issue and the Statute of Frauds, but did not plead the tender of said sum of \$87.50. Tender, to be effectual to relieve from costs, must be pleaded, and the tender kept good by depositing in court with the plea the amount admitted to be due. (*Knox v. Light*, 12 Ill. 86; *Leonard v. Patton*, 106 id. 99; 2 Ency. of Pl. & Pr. 554.) The appellee did not plead the tender, but, on the contrary, pleaded the general issue, and thereby denied the justness of the appellant's demand *in toto*. If it desired to concede the demands of the appellant in part and to combat the remainder and to plead tender as to the part conceded to be just, the plea of the general issue properly limited and plea of tender should have been filed. (Puterbaugh's Com. Law Pl. & Pr. p. 228.) During the hearing of the testimony for the appellee the sum of \$87.50 in gold coin was tendered in open court and deposited with the clerk of the court by the order of the court. But we are unable to see that this availed to relieve the appellee of liability to pay the costs. Section 4 of chapter 135 (Hurd's Stat. 1899, p. 1689,) authorizes a tender to be made, after suit brought, in avoidance of future accruing costs, but the amount to be tendered is the amount conceded to be due and the "costs of suit incurred up to the time of tender." No tender of the costs of the suit which had accrued was made. The appellant having prevailed, was entitled to a judgment also for the costs by her expended, no tender having been pleaded or kept good by deposit of the money tendered in court and clearly due and unpaid.

The judgment in favor of the appellant in the sum of \$87.50 is affirmed and the judgment against the appellant for the costs is reversed, and the cause will be remanded with directions to enter judgment for the appellant for her costs in the trial court. In this court each party will pay one-half the costs.

Affirmed in part and remanded, with directions.

JAMES D. LAMB, Trustee,

v.

THE CITY OF CHICAGO.

Opinion filed December 20, 1905—Rehearing denied Feb. 8, 1906.

1. SPECIAL ASSESSMENTS—*whether improvement is unreasonable is a question of fact.* Whether a paving ordinance, in requiring a new combined curb and gutter instead of using the old curbing which was in place, is so unreasonable and oppressive as to render the ordinance void is a question of fact, and the determination by the county court that it is not unreasonable will be upheld unless clearly contrary to the weight of the evidence.

2. SAME—*when motion to quash is properly overruled.* A motion to quash a special assessment proceeding to pave a street, upon the ground that another proceeding to pave a cross-street, including the intersection of the two streets, was already pending, which motion is made during the course of the trial, is properly overruled, where the alleged former proceeding was dismissed before the hearing of the later proceeding was had.

3. SAME—*objection to vacating judgment and granting new trial must be made below.* An objection to the county court's action in vacating an order reducing an objector's assessment and in allowing a new trial to the petitioner cannot be urged for the first time on appeal, though the ground of the objection is that the term had passed at which the court could rightfully enter such an order but which ground is not shown by the record to exist.

APPEAL from the County Court of Cook county; the Hon. WILLIAM L. POND, Judge, presiding.

This is an appeal from a judgment of the county court of Cook county, rendered January 20, 1905, confirming an assessment against the property of objectors, levied to defray the cost of curbing, grading and paving with macadam, and a combined curb and gutter, Millard avenue from Ogden avenue to West Thirtieth street in Chicago. Ogden avenue intersects Millard avenue at Twenty-first street. The appellant, as trustee for Margaret A. Bonney, holds the fee to seventeen and one-half lots on Millard avenue, abutting upon the line of the improvement here in question, some of

them between West Twenty-third and West Twenty-fourth streets, some of them between West Twenty-fourth and West Twenty-fifth streets, and some between West Twenty-seventh and West Twenty-eighth streets. Millard avenue from Ogden avenue to West Twenty-eighth street was improved from eleven to fourteen years prior to the commencement of this proceeding with cedar blocks and Lemont limestone curb-stones. Millard avenue from West Twenty-eighth street to West Thirtieth street had never been graded, curbed or paved.

On June 27, 1904, the engineer for the board of local improvements presented his estimate for the cost of curbing, grading and paving Millard avenue from Ogden avenue to West Thirtieth street at \$36,000.00, of which \$7950.00 was for a granite, concrete, combined curb and gutter on cinders, 10,600 lineal feet at seventy-five cents a lineal foot. On August 4, 1904, the city filed its petition in the county court, and on August 12, 1904, an assessment roll was filed, in which the seventeen and one-half lots of appellant were specially assessed at \$1722.95, to which appellant filed objections on September 2, 1904. On October 20, 1904, at the October term of the county court, the objections were sustained, and the assessment against the lots was reduced twenty-five per cent, or, in the aggregate, \$430.74.

THOMAS S. MCCLELLAND, for appellant.

ROBERT REDFIELD, and FRANK JOHNSTON, Jr., (EDGAR B. TOLMAN, Corporation Counsel, of counsel,) for appellee.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

First—The main objection, urged by the appellant for a reversal of the judgment, is, that the improvement was unreasonable, oppressive and unjust, and that, therefore, the ordinance was void upon the alleged ground that it provided

for the construction of a combined curb and gutter when the curb on the street was in good condition. It is not denied that Millard avenue from Ogden avenue to West Thirtieth street had been curbed, graded, and paved with cedar blocks and limestone curb-stones eleven years or more before the proceedings for the present improvement were inaugurated. It is not denied that the pavement of the main part of the street is decayed and worn out, so that a new pavement is necessary. The only ground, upon which the ordinance is attacked as unreasonable, is that it provides for the construction, in connection with the new macadam pavement to be put down, of a combined curb and gutter. The contention of the appellant is, that the curb-stones already in the street are in good condition, and that, therefore, it is unnecessary to construct a combined curb and gutter. Whether or not the old curb-stones are in a sufficiently good condition to justify their retention without the construction of a combined curb and gutter is a question of fact, as to which the testimony is conflicting.

Witnesses, testifying for the appellant, stated that the old Lemont limestone curb-stones were in good condition, but admitted that some of the stones were cracked, broken or split, and chipped at the corners, and that some of them, having been down a number of years, were out of alignment. One witness said that he counted eleven stones, which were worthless and broken. The evidence shows that the old curb-stones were set in the ground, leaving from six inches to a foot above the surface, and that the witnesses of appellant only made an examination of these curb-stones, so far as they projected above the surface of the ground, but did not make an examination of those parts of the stones, which were under the ground. There is testimony to the effect that a correct examination cannot be made of the stones below the surface, unless they are taken up. On the other hand, the testimony, introduced by the appellee, showed that this old curbing along the line of the street, proposed to be

improved, had settled and sunk in different places, and that it had been laid in 1891, and was crooked and out of alignment. One of the witnesses, introduced by the city, stated that, if fifty per cent of the old curbing was taken out and fifty per cent of new curbing put in, it would cost about the same as to put in the proposed combination curb and gutter.

The question, whether or not the ordinance was reasonable or unreasonable in requiring a combined curb and gutter, was a question for the decision of the court, and we are unable to say, in view of the evidence thus introduced, that the court did not decide correctly in holding that it was not an unreasonable requirement to have the old curb-stones taken up, and the new combined curb and gutter put in. (*Hawes v. City of Chicago*, 158 Ill. 653).

"The rule is that it requires a clear and strong case to justify a court in annulling the action of a municipal corporation acting within the apparent scope of its authority." (*Hawes v. City of Chicago*, *supra*).

In *Clark v. City of Chicago*, 214 Ill. 318, we said (p. 320): "The question of the necessity of a local improvement is by law committed to the city council, and the courts have no right to interfere to prevent the construction of a local improvement, unless the ordinance is so unreasonable as to render it void.—*Walker v. City of Chicago*, 202 Ill. 531." Some of the testimony tends to show that the old curb-stones were laid in 1893, but other witnesses testified that they were laid in 1891. Where curb-stones have been laid for some thirteen or fourteen years, and have in many places become cracked, seamed and out of alignment, it can not be said that an improvement, which requires the tearing up of such curb-stones and the putting down of a combined curb and gutter in their stead, is so unjust, unreasonable and oppressive as to make the ordinance, providing for such combined curb and gutter, void. It is the peculiar province of the city council to determine the necessity and character of the improvement, and the manner of its construction, and

the presumption always exists in favor of the validity of a statute or ordinance, passed in pursuance of competent legal authority. When the municipal authorities, who have been clothed with power, have acted in strict conformity with the statute conferring the power, their decision must be held final and conclusive, unless it is apparent that their action is unreasonable, unjust and oppressive, which is not shown by the proof in the case at bar. (*City of Chicago v. Wilson*, 195 Ill. 19, and cases there cited). For the reasons above stated, we are of the opinion that the first objection urged by the appellant is not well taken.

Second—Millard avenue between the points, where it is proposed to improve the same, is crossed by West Twenty-fourth street. June 20, 1904, an ordinance was passed by the city council for paving West Twenty-fourth street, including its intersection with Millard avenue, and on July 2, 1904, a petition was filed by the city in the county court under the last named ordinance. The present ordinance for the paving of Millard avenue between the points already mentioned was passed on June 27, 1904, and the petition in this case was filed on August 4, 1904. The point is made by appellant, that the present proceedings should be quashed, because, at and before the passage of the ordinance of June 27, 1904, and the filing of the petition herein on August 4, 1904, another ordinance had been theretofore passed, and proceedings had been theretofore instituted to pave West Twenty-fourth street, which, at its intersection with Millard avenue, included a part of the present improvement, thus making, as is alleged, the present improvement of Millard avenue a double assessment as to the intersection at Twenty-fourth street. It is insisted by the appellant that two suits have thus been begun for the same cause of action, so far as this intersection is concerned, and that, therefore, the present suit, which is the second one, must abate.

It is admitted that the petition and proceedings for the paving of West Twenty-fourth street were dismissed previ-

ous to the hearing of the case at bar. It has been held that the pendency of a former action should be pleaded in abatement, and that such plea in abatement should be filed before any other pleadings, motions or steps are taken in the proceedings. (*Holloway v. Freeman*, 22 Ill. 197; *Union Nat. Bank v. First Nat. Bank*, 90 id. 56). The plea of a pending action is a plea in abatement. In the case at bar no plea was filed, but the motion to quash was made during the trial. If the motion thus made could be regarded as a plea in abatement setting up the pendency of a former action, it was waived here by the filing of general objections. A plea of abatement is waived by the filing of a plea in bar. (*Lindsay v. Stout*, 59 Ill. 491). We have held that overruled objections under a special appearance questioning the jurisdiction of the court to confirm a special assessment are waived by the filing of general objections. (*Porter v. City of Chicago*, 176 Ill. 605). Such general objections were here filed by the appellant after the overruling of the motion in question.

But even if it should be held that two suits were pending at the same time for the same improvement, the present record, as has already been stated, shows that the former was dismissed before the case at bar came to hearing. In 1 Encyclopedia of Pleading and Practice, (p. 755,) it is said: "The prevailing rule now is that the discontinuance or dismissal of the first suit after the commencement of the second may be set up in reply to the plea, and thus defeat an abatement." Consequently, the dismissal of the former proceeding, under the circumstances stated, is sufficient to defeat an abatement of the present proceeding. The objection, thus made by appellant, is in our opinion not well taken for the reasons thus stated.

Third—It is stated that it was unreasonable to require the pavement of the intersection of Millard avenue and Twenty-sixth street upon the alleged ground that the pavement at that point was in good condition, and for that reason the part of Millard avenue at the intersection of Twenty-sixth

street should have been omitted or excepted from the present improvement. There is evidence in the record, showing that the pavement at the intersection of Twenty-sixth street with Millard avenue had been laid for nine years, and was an old cedar block improvement which was much decayed, whereas the improvement in the case at bar was a macadam improvement. We are of the opinion that it was not unreasonable to require the pavement of the intersection in question.

Fourth—On October 20, 1904, the county court reduced appellant's assessment twenty-five per cent but afterwards on November 29, 1904, vacated the judgment so reducing the assessment, and granted to the city a new trial. It is contended by the appellant that, on November 29, 1904, the term, at which the judgment of reduction had been entered on October 20, 1904, had passed, and that, at the subsequent term in November, 1904, the court had no power to grant a new trial to the city. There seems to be some question whether or not the motion for new trial was not made before the October term had passed. Where a motion for new trial is made at the same term, at which the verdict is rendered, the motion for new trial is continued by operation of law, even if no formal order of continuance has been entered. (*Estate of Seiter v. Mowe*, 182 Ill. 351; *People v. Gary*, 105 id. 264; *Donaldson v. Copeland*, 201 id. 540).

Where a new trial is granted after judgment has been entered, the judgment is vacated even though no special order of vacation is entered. (14 Ency. of Pl. & Pr. p. 935; *Constantine v. Foster*, 57 Ill. 36; *Hearson v. Graudine*, 87 id. 115).

The order of November 29, 1904, is in part as follows: "And thereupon after hearing, it is ordered by the court that petitioner's motion for a new trial herein as to the property of objectors * * * be, and is hereby allowed." From this entry it would appear that the petitioner, the city of Chicago, had before November 29, 1904, entered a motion for new trial. Even if the record does not show when that

motion was entered, it will be presumed that it was entered before the expiration of the October term, because all presumptions are in favor of the regularity of the proceedings of the trial court where nothing appears to the contrary. It does not appear, however, anywhere in the record, that the appellant took exception to the action of the court in granting a new trial to the city; and it does not anywhere appear in the record that the objection now made was called to the attention of the trial court. It is, therefore, too late to make it here.

We see no reason for reversing the judgment of the county court, confirming the special assessment in this case, and, therefore, the judgment of the county court is affirmed.

Judgment affirmed.

THE KANAWHA DISPATCH

v.

SOLOMON T. FISH.

Opinion filed December 20, 1905—Rehearing denied Feb. 8, 1906.

1. APPEALS AND ERRORS—*when question of corporate existence of plaintiff in error cannot be tried on motion to dismiss.* A party to the record in the Appellate Court has a right to a writ of error to review an adverse judgment, and if the defendant in error interposes no special plea but joins in error he is not entitled to have the question of fact as to the corporate existence of the plaintiff in error tried upon a motion to dismiss the writ of error.

2. ESTOPPEL—*when party is not estopped to deny corporate existence.* A shipper, by dealing with a dispatch line having no corporate entity, being a mere name used for convenience by several lines of railroad in handling through freight, such dealing not being in any other capacity or relation than that which actually existed between the dispatch line and the several railroads, is not estopped to deny its corporate existence when a suit against him is brought in its name.

3. PRACTICE—*when a cause should be remanded on reversal.* Where the fact that the plaintiff is not a corporation is not controverted on the trial but the Appellate Court differs from the trial

court as to whether the want of corporate existence was a good defense and reverses the judgment, the reversal is the result of a different application of the law by the Appellate Court from the one made by the trial court, and the cause should be remanded.

4. *SAME—when cause should be remanded to enable real parties in interest to be substituted.* Where the Appellate Court reverses a judgment in an action in the name of a dispatch company having no corporate existence, (the real parties in interest being the railroad companies which use the name for convenience,) upon the ground that its lack of corporate existence was a good defense to the suit, the cause should be remanded in order to enable the real parties in interest to be substituted on new trial.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. M. KAVANAGH, Judge, presiding.

CURTIS H. REMY, and EDWARD P. VAIL, for plaintiff in error.

NEWMAN, NORTHRUP, LEVINSON & BECKER, (C. E. CLEVELAND, of counsel,) for defendant in error.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

The Kanawha Dispatch brought a suit in assumpsit in the superior court of Cook county against Solomon T. Fish, defendant in error, Maurice H. Mandelbaum and Alfred P. Lee, as constituting the firm of S. T. Fish & Co., and filed a declaration in the common counts. A bill of particulars was filed, to the effect that defendants made a claim against the Chesapeake and Ohio Railway Company for damages on a lot of butter delivered to plaintiff for shipment from Chicago to Hampton, Virginia, said railway company owning one of the lines over which the butter was transported; that on April 5, 1893, said railway company paid to defendants \$1007.41, the full value of said butter, and that about February 28, 1894, the defendants made a claim against

plaintiff for the same loss, and plaintiff, in ignorance that the claim had been paid by said railway company, again paid the defendants the sum of \$1007.41 in settlement of the claim. The character of the plaintiff as a corporation or legal entity was not alleged in the declaration, but a plea of *nul tiel* corporation was filed with other pleas. The suit was afterward dismissed as to Mandelbaum and Lee when it was ascertained that Fish was the only member of the supposed firm of S. T. Fish & Co. and carried on business under that name. Upon a trial the facts alleged in the bill of particulars were proved, and no evidence was offered by the defendant except evidence tending to prove that the plaintiff was not a corporation. There was a verdict, followed by a judgment, for the plaintiff for the amount of the claim. The defendant appealed to the Appellate Court for the First District. That court reversed the judgment and remanded the cause, but afterward amended the judgment by striking out the remanding order and inserting in the judgment the following finding of fact: "The court finds that the appellee, the Kanawha Dispatch, is not and never has been a corporation." The writ of error in this case was sued out to review the judgment of the Appellate Court.

A motion was made by the defendant in error to dismiss the writ on the ground that plaintiff in error is neither a natural person nor a corporation, and therefore is incapable of maintaining the action, and at his request the motion was reserved to the hearing on the assignment of errors. The motion is denied. An issue was formed in the trial court under the plea of *nul tiel* corporation as to the corporate existence of the plaintiff. The issues in that court were found in favor of the plaintiff. The record shows that the trial court was of the opinion that the plea was no defense to the action, and refused all instructions offered by the defendant directing the jury to find a verdict in his favor if they concluded that the plaintiff was not a corporation. On appeal the judgment was reversed and by amendment the

judgment of the Appellate Court was afterwards made final, with the finding of fact, and there was judgment against plaintiff in error for costs. The writ in this case was sued out to bring into review in this court the judgment of the Appellate Court. The writ corresponds with the record of the Appellate Court, and plaintiff in error being a party to the record in that court had a right to the writ. Defendant in error did not interpose any special plea, but joined in error by the common plea *in nullo est erratum* to the assignment of errors. In that condition of the record defendant in error is not entitled to have the question of fact as to the corporate existence of plaintiff in error tried upon a motion, if the want of corporate existence would be good ground for dismissing the writ.

The finding of the Appellate Court that plaintiff is not and never has been a corporation is binding upon this court, and the only question here is whether the judgment of the Appellate Court was the necessary and proper conclusion of law from the fact so found. There was no controversy over that fact in the trial court or Appellate Court and there is none here, but it is contended that the fact was not a defense because the defendant had dealt with the plaintiff as a corporation, and was estopped, as a matter of law, to deny its corporate existence, and because he had dealt with the railroad companies which were the real parties in interest under that name. We are of the opinion that neither of these positions can be maintained. The evidence contained in the record shows that the Kanawha Dispatch is not a legal entity, but a name used for convenience by a number of railroad companies and steamship lines in handling through freight. The general freight agents of the different roads and lines regulate its affairs as a board but are not elected. It has no stockholders and does not own any railroad or cars, and even the office furniture belongs to the roads that form the combination. Cars are marked "Kanawha Dispatch" and agents solicit through business under that name. Bills

of lading are issued in the name of Kanawha Dispatch and the freight is billed at a through rate. It receives nothing for freight charges, but makes up accounts between the different corporations showing amounts due to or from each. It is not a general partnership, and in one shipment two corporations may be interested and in another shipment to a different place other corporations may have the only interest, and the number varies in the different cases. A railroad or steamship line has no interest in or connection with a shipment which does not go over its line. In case of loss or damage the agency, or the companies between themselves, investigate and locate the fault and the corporation at fault pays the loss. There was no evidence that defendant dealt with the plaintiff as a corporation, or in any other capacity or relation than that which it actually had or sustained toward the different corporations forming the combination. There was nothing upon which to found an estoppel or admission of the defendant of the corporate existence of the plaintiff. Undoubtedly the railroad corporations which paid the claim the second time, and who were the real parties in interest, might have maintained an action, but plaintiff, having no legal existence, could not. As to this shipment, there was a joint undertaking of the railroad corporations under the name "Kanawha Dispatch."

The Appellate Court having differed with the trial court on the question of law as to whether the want of corporate existence was a good defense to the action, a judgment reversing the judgment of the trial court for that error necessarily followed, but we are of the opinion that the Appellate Court erred in amending the judgment by striking out the remanding order. This conclusion is based upon two grounds. There was no controversy whatever in the trial court over the question of fact, but the record shows that the controversy related only to the question of law, and that the difference between the trial court and the Appellate Court was upon the question of law. The reversal did not result

wholly or in part from finding the facts differently, but from a different application of the law, and in such a case the cause should be remanded. Another reason is, that an amendment would be proper to enable the real parties in interest to sustain the action for the claim on account of which it was actually brought. The reversal of the judgment by the Appellate Court obliterated the judgment of the superior court, so that the case would stand precisely as though there had never been any judgment, and under our liberal statute of amendments there may be an entire change of plaintiffs where necessary. That was done in the case of *Teutonia Life Ins. Co. v. Mueller*, 77 Ill. 22, where the administrator who brought the suit on the policy of insurance had no right of action and was dismissed out of the suit and the widow and heirs of the insured were substituted as plaintiffs. This suit was brought, in fact, by the railroad companies, who were the real parties in interest, in the name of the plaintiff, which was a mere name adopted for doing business. If any judgment should be recovered and collected they would be entitled to and would receive the money and the Kanawha Dispatch would get nothing.

The Appellate Court erred in the amendment of its judgment by striking out the remanding order, and the order making such amendment is reversed and the cause is remanded to the Appellate Court with directions to remand the cause to the superior court, with leave to amend the pleadings by making the real parties in interest plaintiffs, and for further proceedings not inconsistent with the views expressed in the opinion of the Appellate Court and this opinion.

Reversed and remanded.

THE B. SHONINGER COMPANY

v.

EDWARD MANN.

Opinion filed December 20, 1905—Rehearing denied Feb. 8, 1906.

1. NEGLIGENCE—*when landlord is liable for injury to persons in building.* A landlord who rents different parts of his building to various tenants, reserving the elevators, halls, stairways and other approaches for the common use of his tenants, is under an implied duty to use reasonable care to keep them in reasonably safe condition, and is liable for injuries to persons lawfully in the building, resulting from a failure to perform that duty.

2. SAME—*when doctrine of assumed risk does not apply.* As between a landlord and a servant of one of his several tenants in a building the doctrine of assumed risk does not apply, since there is no contractual relation of master and servant between them.

3. SAME—*rule where the question of contributory negligence is left to jury.* In determining whether the question of plaintiff's contributory negligence was properly left to the jury the Supreme Court cannot weigh the evidence, but must concede as true all evidence which supports the view taken by the plaintiff and give him the benefit of all legitimate inferences which may be drawn therefrom in his favor.

4. LANDLORD AND TENANT—*when lease does not release landlord from liability to tenant's servant.* A lease giving the tenant a right to the common use of a freight elevator and providing that the landlord shall not be liable for breaks or failure of the elevator machinery, does not release the landlord from liability for injury to the tenant's servant who was not a party to the lease, resulting from the landlord's failure to use reasonable care to keep the hallways and elevator shaft in reasonably safe condition.

5. PLEADING—*party is not required to plead his evidence.* An averment that the plaintiff, as the result of his injury, was wounded, cut and bruised and "otherwise permanently injured and crippled," is broad enough to permit proof that the plaintiff was affected with diabetes as a result of his injury.

6. CONTINUANCE—*when continuance on ground of surprise is properly denied.* Continuance on the ground of surprise, alleged to result from the allowance of an amendment to the declaration made to permit proof that the plaintiff was suffering from diabetes as a result of his injury, is properly denied where the proof would have been competent under the original declaration without the amendment.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JOHN L. HEALY, Judge, presiding.

ROSENTHAL, KURZ & HIRSCHL, for appellant.

DAVID K. TONE, ARNOLD HEAP, and P. J. KEENAN, for appellee.

Mr. JUSTICE HAND delivered the opinion of the court:

This was an action on the case commenced in the superior court of Cook county by Edward Mann, by his next friend, against the appellant, to recover damages by reason of an injury to his person sustained by him in consequence of his falling down an unguarded elevator shaft in a building in the city of Chicago which was under the control of the appellant. The declaration contained two counts. The general issue was pleaded, and upon a trial the jury returned a verdict in favor of the plaintiff for the sum of \$10,000, upon which verdict the court, after overruling a motion for a new trial, rendered judgment, which judgment, upon appeal, was affirmed by the Appellate Court for the First District, and a further appeal has been prosecuted to this court.

The defendant, at the close of all the evidence, moved the court to instruct the jury to return a verdict in its favor. This the court declined to do, and the action of the court in that regard is assigned as error.

The evidence introduced on behalf of the plaintiff fairly tended to prove that the appellant was in possession of a four-story building known as 267 and 269 Wabash avenue, in the city of Chicago, under a lease from the owner; that it sub-let the several floors of said building to different tenants for business purposes; that Thompson & Thomas be-

came the lessees of the second and fourth floors; that the building, which fronts east, had a freight elevator in its rear part, which was reached from an entry which opened upon a north and south alley which ran in the rear of the building; that defendant retained the control of the halls, entry and elevator in the building for the common use of its several tenants; that the plaintiff was sixteen years of age and had been in the employ of Thompson & Thomas, for two or three weeks prior to his injury, as an errand boy; that he had only been in the elevator two or three times prior to the accident; that at about 5:30 on the evening of December 10, 1901, in company with two other boys, he was directed by his employers to take to the rear entrance of the building certain packages, which were there to be delivered to the agents of several of the express companies doing business in said city. The boys placed the packages in the elevator and went with them to the first floor. The packages were there removed by them and placed in the entry which led to the alley. It was quite dark in that part of the building, and they had with them a lantern, which was carried by one of the boys other than the plaintiff. There was also a stationary lamp in the elevator. While the boys were sorting out the packages and delivering them to the agents of the express companies, the man in charge of the elevator, without closing the door of the shaft, took the same to an upper floor of the building. During the process of delivering the packages the plaintiff stepped near the elevator shaft and slipped and fell into the shaft, where he was severely and permanently injured by striking upon the floor of the basement. The man in charge of the elevator did not close the elevator door when the elevator left the first floor or give notice to those present that the elevator was about to ascend, and the plaintiff testified he did not know, before he slipped into the elevator shaft, that the elevator had been taken up to another floor or that the approach to the elevator shaft was unguarded.

It is first contended that the evidence does not show that the appellant was guilty of actionable negligence. The law is well settled in this State that a landlord who rents different parts of a building to various tenants and retains control of the stairways, passageways, hallways or other methods of approach to the several portions of the building for the common use of the tenants, has resting upon him an implied duty to use reasonable care to keep such places in a reasonably safe condition, and that he is liable for injuries which result to persons lawfully in the building from a failure to perform such duty. (*Payne v. Irvin*, 144 Ill. 482; *Burke v. Hulett*, 216 id. 545.) The plaintiff, therefore, being lawfully in the entry-way to the elevator, the defendant owed a duty to him to keep said elevator shaft in a reasonably safe condition. The evidence shows at the time the plaintiff was injured the entry-way to the elevator from the alley was poorly lighted; that the plaintiff had been in that part of the building but a few times and was not very familiar with the surroundings; that the elevator was taken by the man in charge thereof, who was the servant of the defendant, to an upper floor without notice to the plaintiff; that the opening to the shaft through the entry-way was left unguarded after the elevator was removed to the upper floor, and that the plaintiff, while engaged in handling the packages in the entry, slipped and fell into the open shaft. Had the entry-way been well lighted or the plaintiff notified the elevator was about to be taken to an upper floor, in all probability he would not have been injured. It is certain he would not have been injured had the door been closed when the elevator ascended. We think it clear, therefore, that the trial court could not say, as a matter of law, in view of the facts, the defendant was not guilty of negligence, but think the question of the defendant's negligence was properly left by the court to the jury.

It is next contended the plaintiff cannot recover because it is said he assumed the risk of being injured by falling into

said elevator shaft. The plaintiff was not the servant of the defendant but was in the employ of Thompson & Thomas. There was, therefore, no contractual relation existing between the plaintiff and the defendant, and as the doctrine of assumed risk rests upon and grows out of the contractual relation which exists between master and servant, (*Pennsylvania Co. v. Backes*, 133 Ill. 255; *Chicago and Eastern Illinois Railroad Co. v. Randolph*, 199 id. 126; *Chicago and Eastern Illinois Railroad Co. v. Heerey*, 203 id. 492;) the question of assumed risk is not involved in this case, and defendant cannot be relieved of liability on the ground plaintiff assumed the risk which caused his injury.

It is next urged that the plaintiff was guilty of contributory negligence and for that reason he cannot recover. Contributory negligence is usually a question of fact for the jury, and the court can only say, as a matter of law, a plaintiff has been guilty of such contributory negligence as should defeat a recovery when the facts are not in dispute and the legal conclusions to be drawn from the admitted facts are so clear that all reasonable men, from a consideration thereof, must reach the conclusion that the plaintiff was guilty of contributory negligence. Here the entry to the elevator was not well lighted. The plaintiff did not know the elevator had been taken to an upper floor and that the elevator shaft was left open and unguarded, and he did not walk, but slipped and fell, into the open elevator shaft. It is urged he ought to have known the elevator was not at the first floor; that the shaft was open and that the door would not work, and it is said he did not slip and fall, but walked into the open shaft. In passing upon a motion for a directed verdict the court cannot weigh the evidence, but it is bound to concede to be true all evidence which supports the view of the plaintiff and give him the benefit of all legitimate inferences which are to be drawn therefrom in his favor. We think the question of contributory negligence was properly left to the jury.

After the trial had proceeded some time it developed that the plaintiff was affected with diabetes as a result of the injury. Objection was made to that proof on the ground the declaration was not broad enough to admit proof of that fact. The plaintiff took leave to amend his declaration, and inserted in each count thereof the words, "and thereby the plaintiff's liver, kidneys, nervous system and brain were permanently injured," whereupon defendant asked for a continuance on the ground of surprise, but the court declined to continue the case and the trial proceeded. Each count of the declaration, prior to the amendment, averred the plaintiff was "cut, bruised and wounded, and thereby lost the sight of one of his eyes and was otherwise permanently injured and crippled." It is not, in an action of this kind, necessary that the plaintiff plead his evidence. The declaration averred the permanency of plaintiff's injury, which was sufficient to admit evidence that as a result of the injury he was affected with diabetes. The declaration, therefore, without the amendment, was sufficient to admit the proof and its amendment afforded no ground for a continuance. *Lake Shore and Michigan Southern Railway Co. v. Ward*, 135 Ill. 511; *Baltimore and Ohio Southwestern Railway Co. v. Slanker*, 180 id. 357.

The lease from defendant to Thompson & Thomas provided that they should have the use of the freight elevator in company with the other tenants, and provided that if any break or failure should occur in the elevator machinery the defendant should not be held liable therefor, but should repair the same with all speed and no unnecessary delay. The plaintiff was not a party to the lease, and the duty of the defendant to him was not affected by that provision of the lease. *Springer v. Ford*, 189 Ill. 430.

Finding no reversible error in this record the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

THE PEOPLE *ex rel.* North American Restaurant, etc.

v.

ARTHUR H. CHETLAIN.

Opinion filed December 20, 1905—Rehearing denied Feb. 8, 1906.

1. CONSTITUTIONAL LAW—the *Shorthand Court Reporter act of 1887 is not unconstitutional*. The act of 1887, (Laws of 1887, p. 159,) authorizing circuit judges to appoint shorthand reporters for the court, is not in violation of sections 9, 10 and 13 of article 10 of the constitution. (*People v. Raymond*, 186 Ill. 407, followed.)

2. SAME—sections 10 and 13 of article 10 of constitution do not refer to offices created by legislature. Sections 10 and 13 of article 10 of the constitution, relating to the right of the county board to fix the compensation for county officers, and requiring all persons elected or appointed to office who are paid, in whole or in part, by fees, to make sworn semi-annual reports to some officer designated by law, do not refer to an office created by the legislature.

3. SAME—a *per diem allowance is not "fees."* A *per diem* allowance to an officer cannot be regarded as "fees," within the meaning of that term as used in the constitution, concerning officers paid wholly or in part by fees, but must be regarded as compensation.

4. BILLS OF EXCEPTION—*party is not compelled to use notes of official court reporter*. The act of 1887 does not compel a party preparing a bill of exceptions to use the official court reporter's notes, and he may submit a bill of exceptions containing evidence taken by any competent reporter; but if the parties do not agree as to the correctness of the bill of exceptions, the trial judge, as an aid to his recollection, may order a transcript of the official court reporter's notes and tax the charge therefor as costs.

5. SAME—*trial judge cannot refuse to sign a bill of exceptions merely because official court reporter's notes have not been used*. Refusal of a trial judge to sign and seal a bill of exceptions upon the sole ground that the transcript of evidence therein contained was not prepared by the official court reporter is improper, and if no other objection to the bill of exceptions exists it is the duty of the judge to sign and seal the same, and he may be compelled, by *mandamus*, to do so.

6. SAME—*power of court to order transcript of court reporter's notes is not arbitrary*. The act of 1887, concerning shorthand reporters, does not invest the trial judge with power to arbitrarily

order a transcript of the court reporter's notes before he has examined the bill of exceptions presented to ascertain its correctness or before any disagreement of the parties as to its correctness has been called to his attention.

ORIGINAL petition for *mandamus*.

This is an original petition for *mandamus*, filed in this court by the People on the relation of the North American Restaurant and Oyster House against Arthur H. Chetlain, one of the judges of the superior court of Cook county, commanding him to sign and seal a bill of exceptions, and permit the same to be filed of record.

The petition alleges that the relator, a corporation organized under the laws of Illinois, was sued at law on or about May 28, 1903, in a certain suit in said superior court, wherein John McElligott, administrator of the estate of Richard D. McElligott, deceased, was plaintiff, which suit was instituted to recover damages for the alleged wrongful causing of the death of Richard D. McElligott; that the same came to trial on April 28, 1905, before the Hon. Arthur H. Chetlain, judge as aforesaid, and that the trial was completed on or about May 4, 1905, resulting in a verdict of guilty against the relator, petitioner herein, for the sum of \$5000.00; that on May 20, 1905, the petitioner's motion for a new trial was overruled, and final judgment entered against it for said sum and costs; that exceptions were taken to the overruling of said motion for new trial and entry of said judgment, and an appeal therefrom was duly prayed and allowed to the October term of the Appellate Court, an appeal bond in the sum of \$6000.00 to be filed in thirty days, and a bill of exceptions within sixty days from May 20, 1905; that the bond was duly filed; that a true, correct, complete and accurate bill of exceptions was prepared on behalf of petitioner and submitted to said judge on July 5, 1905, at which time he was requested to sign and seal said bill of exceptions, but

declined and refused to sign and seal the same, and informed petitioner that he did not then feel disposed to sign said bill of exceptions, for the reason that the transcript of evidence therein contained was not prepared by his official court reporter, one James E. Ford, but would consider the matter further and hear arguments of counsel on the question, whether a presiding judge is required to sign a correct and proper bill of exceptions, where said presiding judge has appointed an official court reporter, and the transcript of evidence, contained in such bill of exceptions, is not prepared by the official court reporter; that, on July 5, 1905, the time for filing said bill was extended to August 5, 1905, and that within that time, to-wit, on July 29, 1905, petitioner presented to said judge, and in his court room, its proposed bill of exceptions, which was a correct, accurate and complete one, and requested said judge to sign and seal the same; and thereupon, after hearing argument, he declined and refused to sign and seal said bill of exceptions, and informed petitioner that he would not sign and seal said bill of exceptions, or any other bill of exceptions proposed by petitioner, unless it contained a transcript of evidence made and prepared by said official court reporter; that a true copy of said bill, so submitted to said judge, is annexed to the petition.

The petition then sets forth an agreed statement of facts, signed by the respondent, Judge Chetlain, and by the petitioner, which said agreed statement of facts is substantially as follows: *First*, that said Chetlain, one of the judges of said court, as such judge on March 13, 1905, appointed one James E. Ford, a competent court reporter, as the official court reporter for and of the court presided over by said judge, of which appointment counsel for petitioner had due notice, and that the same was in accordance with the terms of the statute in such case made and provided; *second*, that said Ford, from the time of his appointment and during all subsequent times in the petition referred to, was acting as such official court reporter of said court, and performed his

duties in accordance with the provisions of the statute, and was at all times a competent and skillful court reporter; *third*, that the petitioner did not request of the court, or of the official court reporter, that a transcript of the evidence and proceedings should be made for the petitioner, and that no transcript of the evidence and proceedings of said trial was ordered from, or caused to be written up by, the said official court reporter; *fourth*, that the transcript of evidence and proceedings of the trial were prepared by competent, skilled and experienced court reporters, other than the said official court reporter, under the orders and at the request of petitioner, by and through its counsel; that said bill of exceptions was objected to by counsel for plaintiff, on the ground that the transcript of evidence therein contained was not made up by the official stenographer, Ford, and the attorney for the plaintiff declined to accept any other; *fifth*, that the trial judge did not, either before or during said trial, order the petitioner to patronize the said official court reporter in the matter of procuring a transcript of the evidence and proceedings, and neither the trial court nor said official court reporter, before, at, or during the trial, asked or requested the petitioner or its representatives to patronize the official court reporter; *sixth*, the petitioner was not told, before the conclusion of the trial by the court or the official court reporter, that the trial court would decline or refuse to sign a bill of exceptions, unless the transcript of evidence and proceedings of the trial in such bill of exceptions contained was prepared by the official court reporter; *seventh*, that the proposed bill of exceptions, presented to the trial judge by the petitioner, was not examined by the trial judge, nor was it found by him to be inaccurate or incomplete, but the sole reason for his declining to sign and seal the same was, and is, that the transcript of evidence and proceedings of the trial therein contained was not made by the said official court reporter; *eighth*, that petitioner has paid approximately \$175.00 for the transcript of evidence and pro-

ceedings had at the trial, which is incorporated in and made a part of the proposed bill of exceptions, and that it would cost the petitioner in the vicinity of \$140.00 more to obtain from the official court reporter a transcript of said evidence and proceedings; which said agreed statement of facts is signed by Arthur H. Chetlain, judge, and by the People on the relation of said relator, by their attorney.

The petitioner alleges that it has a meritorious case, and that, without a bill of exceptions, all benefits of an appeal will be lost; that, although on July 29, 1905, it presented its bill of exceptions above mentioned in accordance with the terms of due notice given, and then and there moved and requested the court to sign and seal said bill of exceptions and permit it to be filed as such, yet the said judge then and there refused and still refuses to receive said bill of exceptions or to examine, sign or seal it as such, or to point out wherein, if at all, it is incorrect, inaccurate or insufficient, etc.

The answer of Arthur H. Chetlain admits that said bill of exceptions was presented to him by the petitioner, and that he was requested to sign the same; that the trial of said cause occupied four days, beginning on April 28, 1905, and ending on May 3, 1905; that, between the last date and the presentation of the said bill of exceptions, a period of nine weeks elapsed during which the respondent was engaged in the trial of causes; that respondent was holding court six or seven hours a day six days of the week; that, by reason of the volume of business thus transacted, respondent, before April 28, 1905, found that it was impracticable for him to retain and carry in his mind, by any system of personal notes he might take of the testimony in causes tried before him, sufficient recollection of the testimony to enable him to intelligently and expeditiously settle bills of exceptions, or to pass upon or determine the correctness or accuracy of proposed bills of exceptions, without recourse to some other legal method in the premises; that accordingly, on March 13, 1905, he appointed said Ford official reporter in accord-

ance with the terms of the statute, of which appointment the petitioner before said trial was advised; that Ford performed his duties, as such reporter, in accordance with the provisions of the statute, and was a competent and skillful court reporter in whom respondent reposed the utmost confidence; that after his appointment, respondent, in reliance upon his faithful discharge of his duties, virtually abandoned and ceased the making of personal notes on the evidence offered or received and proceedings had in causes tried before him; that he made no personal notes of the evidence and proceedings in said case above named, and could not on May 15, 1905, or at any time since said date, and cannot now, correct or revise or determine the correctness or incorrectness, or point out the incorrectness or omissions in said draft or certificate of evidence, save by recourse to some aid to respondent's recollection agreeable to law; that he can not settle the bill of exceptions in said last mentioned cause, save by the aid of notes and transcript of notes of the same, taken by the said Ford, as such court reporter, although he admits and states the fact to be that all original exhibits in said bill contained and all witnesses were accessible to respondent; that "by reason of the premises, respondent never examined said draft or certificate of evidence, nor determined or arrived at any belief or opinion as to its accuracy, correctness, sufficiency or completeness."

The answer further admits that respondent signed said agreed statement of facts; that respondent on July 5 and July 29, 1905, "advised petitioner that respondent would not undertake to pass upon or determine the correctness or incorrectness of said draft of a bill of exceptions, except with the assistance of a transcript of the notes of said official court reporter of the evidence upon said trial of said last mentioned cause, and that, by virtue of the statute, respondent would require petitioner to pay, in the first instance, for such transcript of said official notes; that no formal order was entered by respondent as such judge, either directing

such official court reporter to prepare such transcript of his said notes, or requiring the petitioner to secure such transcript, or formally ordering and directing that the costs of such transcript should be paid in the first instance by the petitioner; but that no objection was made at any time by the petitioner to the omission to enter any such formal order or orders," etc.; that petitioner refused in any event to pay in the first instance for such transcript of such official notes; that, "had the transcript of evidence in said draft of a bill of exceptions contained been a transcript of said official court reporter's notes of the evidence and proceedings in question, respondent would have examined said draft and have proceeded in accordance with law, to settle therefrom a bill of exceptions in said cause."

The answer further states that respondent "is and has been at all times ready and willing to settle, sign and seal a true, correct, complete and accurate bill of exceptions in said cause, and to that end to examine said proposed draft of a bill of exceptions, and determine its accuracy and sufficiency, and point out its inaccuracies, omissions and insufficiencies, if any, on the sole condition that the petitioner * * * pay in the first instance for a transcript of said notes of said official reporter of the testimony and evidence in said cause, in accordance with the requirement thereof, as aforesaid, by respondent, under and by virtue of the statute in such case made and provided, to be used by respondent in examining and determining the correctness of said draft of a bill of exceptions, and settling a true, complete and accurate bill of exceptions in said cause."

O. W. DYNES, for relator:

Mandamus will lie to compel a judge to sign a bill of exceptions when a correct one is presented in apt time, in cases where the right of appeal exists. *People v. Pearson*, 2 Scam. 189; 3 id. 270; *People v. Jameson*, 40 Ill. 93; *Hulett v.*

Ames, 74 id. 253; *People v. Williams*, 91 id. 87; *People v. Pendergast*, 117 id. 588; *People v. Anthony*, 129 id. 218; *Hawes v. People*, 129 id. 123; *People v. Chytraus*, 183 id. 192; *People v. Holdom*, 193 id. 319.

When, according to the undisputed facts, a correct, complete and accurate bill of exceptions is presented to the judge, he is without discretionary power, and being without discretion is obliged to act and sign the bill of exceptions. *Graham v. People*, 111 Ill. 253.

The trial court cannot refuse a bill of exceptions because it was not prepared by the official reporter or verified by any such person or official. *People v. Holdom*, 192 Ill. 319.

The law of 1887 is unconstitutional in that it prevents the county board from regulating the salary of the county employee called the official court reporter. Const. of 1870, art. 10, secs. 7, 9, 10.

The law of 1887 is unconstitutional because it omits to provide that the official court reporter shall make a semi-annual report to a designated officer of all his fees and emoluments, as by the constitution required. "Every person who is elected or appointed to any office in this State, who shall be paid, in whole or in part, by fees, shall be required by law to make a semi-annual report, under oath, to some officer to be designated by law, of all his fees and emoluments." Const. of 1870, art. 10, sec. 13.

LLOYD C. WHITMAN, (HENRY HORNER, Jr., of counsel,) for respondent:

Respondent may, under the act of 1887, lawfully require petitioner, in the first instance, to pay for a transcript of the official reporter's notes as a prerequisite to an examination by respondent of the proposed bill.

The trial judge is not obliged to settle and sign a proposed bill of exceptions because no objection is made to its contents by the adverse party. He must examine the bill

and exercise an independent judgment as to whether a proposed bill of exceptions contains a truthful account of the events of the trial. 3 Ency. of Pl. & Pr. p. 447; *Duer v. Davison*, 52 Ill. 110; *People v. Williams*, 91 id. 87; *People v. Holdom*, 193 id. 319.

It follows that if the court is unable, from his independent recollection, to determine the accuracy and correctness of a proposed bill of exceptions, he may, without waiting objection or controversy by counsel, resort to all available means to determine the facts. Where there is an official court reporter the transcript of the notes of such reporter is such available means to which the court may, by the express terms of the statute, of his own motion resort. *Hurd's Stat.* chap. 37, sec. 82b; *Central School Supply House v. Hirschy*, 106 Ill. App. 258; *Gillies v. Kent*, 106 Mich. 687.

The transcript of notes of a non-official court reporter is not such available means. *Grand Lodge v. Ohnstein*, 110 Ill. App. 312; *Dougherty v. People*, 118 Ill. 160; *Hubbard v. People*, 197 id. 15.

If the trial judge is not satisfied that a proposed bill of exceptions is true and correct, he will not be required, by *mandamus*, to sign the same. *People v. Williams*, 91 Ill. 87; *People v. Gary*, 105 id. 264; *People v. Jones*, 103 Ill. App. 189; *People v. Holdom*, 193 Ill. 319.

The law of 1887 does not contravene sections 9 and 10, or section 13, article 10, of the Illinois constitution.

Neither section 10 nor section 13 refers to an office created by the legislature. *People v. Harper*, 91 Ill. 357; *People v. Loeffler*, 175 id. 585; *People v. Bollam*, 182 id. 528.

The official court reporter is not a deputy or assistant of the clerk of the court, within the meaning of section 9 of article 10. *People v. Raymond*, 186 Ill. 415; *Hubbard v. People*, 197 id. 15; *Central School Supply House v. Hirschy*, 106 Ill. App. 258.

Nor is the official court reporter himself a county officer. The authority to fix his compensation is covered by section

32 of article 6 of the constitution. *Wulf v. Aldrich*, 124 Ill. 591.

The per diem allowance is not a fee, but merely compensation. *Knox County v. Christianer*, 68 Ill. 453; *Board of Supervisors v. Johnson*, 64 id. 149.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

First—It is insisted by the relator that the act of 1887, providing for the appointment of official court reporters, is unconstitutional. The question as to the constitutionality of the act is hardly an open one, as it was held to be constitutional in certain respects in the case of *People v. Raymond*, 186 Ill. 407.

The act is said to be in contravention of sections 9, 10, and 13 of article 10 of the constitution of 1870, upon the alleged ground that it is an attempt by the legislature to authorize the judges to determine the compensation of the official court reporter, and thereby to take from the county board the privilege and constitutional prerogative of determining and fixing the amount of compensation to be received by such reporter for his services. This precise point was passed upon by this court in *People v. Raymond, supra*, where, in referring to this feature of the act of 1887, we said: "The legislature has the power to appropriate the funds of a county, or to authorize the judges of the circuit courts to appoint shorthand reporters, and make their compensation a charge upon Cook county, without the action of the board of commissioners."

It is further said, that the act does not comply with section 13 of article 10 of the constitution, which provides that "every person who is elected or appointed to any office in this State, who shall be paid in whole or in part by fees, shall be required by law to make a semi-annual report, under oath, to some officer to be designated by law, of all his fees and

emoluments." Neither section 10, nor section 13, of article 10 of the constitution refers to an office created by the legislature. (*Jimison v. Adams County*, 130 Ill. 558; *People v. Harper*, 91 id. 357; *People v. Loeffler*, 175 id. 585; *People v. Bollam*, 182 id. 528). In *People v. Loeffler*, *supra*, we said (p. 604): "When an office is created by a statute, it is wholly within the control of the legislature creating it. The length of term and mode of appointment may be altered at pleasure, and the office may be abolished, and the compensation taken away from the incumbent, unless forbidden by the constitution." The compensation, which the county is authorized by the act of 1887 to pay to the official court reporter, is a *per diem*, not exceeding \$5.00 per day. Such *per diem* allowance cannot be regarded as "fees" in the sense, in which that term is used in the constitution, but must be regarded as compensation. (*Knox County v. Christianer*, 68 Ill. 453; *Board of Supervisors v. Johnson*, 64 id. 149).

Second—The other questions involved in the case depend upon the construction to be given to the act of 1887, as applied to the facts in the case at bar. The petitioner herein presented to the respondent, as judge of the Superior court, after the case referred to in the statement preceding this opinion was tried, a bill of exceptions to be signed and sealed, containing a transcript of the evidence, introduced upon the trial, which had been taken by a shorthand reporter, who was not the official reporter of the court. It is not claimed by the respondent in his answer that the bill of exceptions, presented to him, was in any respect incorrect or inaccurate. The sole ground, upon which he refused to sign and seal the same, was that the transcript of the evidence, embodied in it, had not been prepared by his official court reporter. The answer shows that the respondent did not examine the bill of exceptions, submitted to him for his signature and seal. The seventh paragraph of the agreed statement of facts is, "that the proposed bill of exceptions,

presented to the trial judge by the petitioner herein, was not examined by the trial judge, nor was it found or believed by him to be inaccurate, incorrect or incomplete, but that the sole reason for his declining to sign and seal the same was, and is, that the transcript of evidence and proceedings of the trial therein contained were not made by said official court reporter." We do not think that the answer of the respondent, as set forth in the statement preceding this opinion, presents any sufficient reason or valid excuse for refusing to sign the bill of exceptions presented to him.

The petitioner in the case, which was tried, had paid approximately \$175.00 for the transcript of evidence, embodied in the bill of exceptions, which it presented to respondent, and it would have cost it an additional sum of \$140.00 to obtain from the official court reporter another transcript of said evidence. Respondent states in his answer that he declined to pass upon or determine the correctness or incorrectness of the draft of the bill of exceptions, presented to him, unless he had the assistance of a transcript of the notes of said official reporter of such evidence. Respondent also says in his answer that he told the petitioner that he would require it to pay in the first instance for a transcript of the notes of the official court reporter.

The act of 1887 does not make it obligatory upon the party, preparing a bill of exceptions, to use the notes of the official court reporter only, but he may prepare and submit a bill of exceptions, containing evidence taken by any competent and reliable reporter, whom he chooses to employ.

Section 2 of the act of 1887 provides as follows: "The said reporter shall cause full phonographic notes of the evidence in all trials in the court, for which he is so appointed, to be taken down, and one transcript of the same, if desired by either party to the suit, or by their attorney, or by the judge of the court, to be forthwith correctly made and furnished to the party so desiring it." If either party desires a copy of the official court reporter's notes, he may order the

same; but the inference is clear that, if he does not desire such copy, he need not order the same. The official court reporter is entitled to his *per diem* compensation, and to be paid the same by the county treasurer, independently and outside of the cost of writing up his notes, after they have been taken. Section 2, in the first proviso thereto, provides that, "when the judge trying the cause, shall, of his own motion, order a transcript of said shorthand notes as hereinbefore provided, he may direct the payment of the charges therefor, and the taxation of the same as costs, in such manner as to him may seem just." The words, "as hereinbefore provided," refer back to the first part of the section, which states that the reporter shall cause his notes to be taken down, and one transcript of the same, if desired "by the judge of the court to be forthwith correctly made and furnished." That is to say, if the judge desires a copy of the official reporter's notes as an aid to his recollection, he may direct the payment of the charges therefor, or the taxation of the same as costs, in such manner as to him may seem just. In the present case, it appears affirmatively that the petitioner did not order a copy of the official court reporter's notes to be written up. It also appears affirmatively that the respondent did not order a transcript of such notes to be written up, and presented to him. He did not direct the official court reporter to write up his notes, and furnish him a copy to be paid for, as he should direct, and to be taxed as costs. He simply told the petitioner, who presented to him a bill of exceptions, that he would not examine the same, or pass upon its correctness, unless the petitioner would procure a copy of the official shorthand reporter's notes, and submit that copy to him to be used in connection with his examination of the bill of exceptions submitted to him. In our opinion this was not the correct course to be pursued.

It is the duty of the trial judge to examine the bill of exceptions, which is submitted to him, and to determine whether it is correct and accurate. In *People v. Pearson*,

2 Scam. 189, we said (p. 205): "The person, who offers a bill of exceptions, ought to present such an one as the judge can sign. The course to be pursued is either to endeavor to draw up a bill, by agreement, which the judge can sign, or to prepare a bill to which there will be no objections, and present it to the judge. * * * The judge must determine its accuracy, and whether it correctly recites the points made, and opinions excepted to; that he must sign such an one as he believes to be correct, and none other; that he cannot refuse to sign a bill altogether, but must sign one if required, in a case where there have been exceptions taken, provided it is applied for at the proper time. * * * The law makes him, and properly so, the judge of the propriety and accuracy of the act he is called on to solemnly verify the truth of, so that it shall become a part of the record in the cause; and it is not for other parties to determine the truth." The trial judge cannot substitute the notes of the official court reporter for his own judgment, or his own recollection, as to what occurred upon the trial. He can only order a transcript of such notes, when such transcript becomes necessary in order to enable him to determine whether or not the bill of exceptions, submitted to him, is correct and accurate, after it has been so submitted.

In *People ex rel. v. Williams*, 91 Ill. 87, we said (p. 91): "It is set up in the petition, and not denied in the answer, that a full phonographic report of all the evidence offered on the trial was made at the time by skilled reporters. If this be true, we cannot see how there can be much room for controversy in regard to the evidence. But if this was not the case, the judge, who tried the cause, with the aid of counsel on each side of the case, ought to be able, without unnecessary trouble, to determine what evidence was given on the trial, and incorporate the same in the certificate of evidence. If the judge cannot remember the evidence, he might send for the witnesses who testified before him and examine them again, and in this or some other mode deter-

mine the facts to be incorporated in the certificate." The signing and sealing of a bill of exceptions is not merely a ministerial, but it is a judicial act. "The determination of what it shall contain is necessarily judicial in its character. (*Hake v. Strubel*, 121 Ill. 321). The judge must determine judicially, in the first instance, what the bill of exceptions shall contain, that it may truly and fairly present the facts and rulings occurring on the trial of the cause; and may, in the first instance, resort to all available means to determine the facts, and to secure accuracy in making up the record." (*People v. Williams*, 91 Ill. 87; *People v. Gary*, 105 id. 264). Inasmuch, therefore, as the determination of the correctness and accuracy of the bill of exceptions is a judicial act, such judicial function could not, under the constitution, be delegated to an official court reporter. The judge cannot accept the notes of such reporter, as determining what evidence was introduced and what rulings were made, independently of his own recollection and judgment. It is the duty of the court to use such notes, merely as an aid to his recollection, and not as a substitute for it. (*People v. Anthony*, 129 Ill. 218; *People v. Chytraus*, 183 id. 190; *People v. Holdom*, 193 id. 319).

The fourth paragraph in the agreed statement of facts states that "the transcript of evidence and proceedings of the trial hereinbefore mentioned were prepared by competent, skilled and experienced court reporters, other than the said official court reporter, under the orders, and at the request of the petitioner, by and through its counsel. And said bill of exceptions was objected to by counsel for the plaintiff on the ground that the transcript of evidence therein contained was not made up by the official stenographer, James E. Ford; and the attorney for the plaintiff declined to accept any other." It thus appears that the bill of exceptions, prepared by the petitioner, was submitted to the counsel on the other side, and no objection was made to its accuracy or correctness, but merely that the transcript of the evidence

therein contained had not been made up by the official court reporter. If the opposing counsel made no other objection to the bill of exceptions than the fact that the transcript of evidence therein was not made up by the official court reporter, then the respondent would have been justified in accepting the bill of exceptions presented to him as correct, and in signing and sealing the same. It has been said, in reference to the draft of a bill of exceptions, that "the draft so prepared, or a copy thereof, should be submitted, within the time required by law, to the adverse party for his examination and suggestion of amendments." (2 Ency. of Pl. & Pr. pp. 442, 443). It has also been said that "where the parties do not agree, the trial judge must decide as to the proper contents of the bill and proceed to settle and sign it accordingly. * * * In the settlement of a bill of exceptions, the trial judge exercises a wide discretionary power. He may refer to the reporter's notes of the evidence, or to his own minutes, and may recall and examine the witnesses as to their testimony on the trial." (3 Ency. of Pl. & Pr. pp. 448, 449). It has always been the practice in this State for the party who has prepared his bill of exceptions to submit it to the counsel upon the other side for examination. In *Weath-erford v. Wilson*, 2 Scam. 253, we said (p. 256): "It was no doubt the duty of the judge below to have signed a bill of exceptions containing the testimony; and if the judge, as stated by him, had not preserved minutes of the testimony, he should have permitted the party to have made out a statement of the evidence, and required it to be submitted to the opposite party for correction; and if the parties could not agree what the evidence was, the judge should then have corrected the bill with the best lights he possessed."

So, in the case at bar, one of the objects of the act of 1887, in empowering the judge to cause a copy of the official reporter's notes to be prepared for him, is to enable him to settle questions in regard to the accuracy and correctness of the bill of exceptions submitted to him, which the counsel in

the case disagree about. He is not invested with the arbitrary power of ordering such a transcript of the evidence to be made by the official reporter, simply because he desires to use such transcript in his examination of the bill of exceptions, submitted to him, before he has examined the latter to see whether it is correct or not, and before any disagreement of counsel as to its correctness has been called to his attention. Such transcript of the official reporter's notes is to be used as an aid to the recollection of the judge, and in the determination of disputed points. In the present case, the respondent refused to sign the bill of exceptions, presented to him, upon the ground that the transcript of the evidence, taken by the official reporter, had not been made by the latter, and without any examination at all on his part of the bill of exceptions prepared by petitioner, and without any knowledge on his part that such bill of exceptions was inaccurate or incorrect, and without any complaint on the part of the opposing counsel that the same was incorrect or inaccurate.

"A return to the alternative writ, which alleges that the relator had no authority to compel the respondent to sign the bill, since he himself must be the judge of the correctness of the exceptions, is insufficient, if it fails to show that the bill, as presented, did not state the facts truly, or that the exceptions were not taken in the proper manner and at the proper time. But the writ may direct the judge to sign the bill, as tendered, if it fairly presents the facts." (High on Ex. Legal Rem.—2d ed.—p. 180.) The return of respondent in the case at bar fails to show that the bill of exceptions, presented to him, did not state the facts truly. The language, used in the case of *People v. Holdom*, 193 Ill. 319, is precisely applicable here, to-wit: "We do not desire to be understood as requiring respondent to approve the particular bill of exceptions presented to him in the exact condition as presented, but it was and is his duty to examine it, and to point out where the inaccuracies are, and what corrections

should be made; and when the bill in his judgment, truly sets forth the proceedings and the evidence, it is his duty to sign and seal the same."

Peremptory writ of *mandamus* is granted.

Writ awarded.

JOHANN HOCH

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Opinion filed December 20, 1905—Rehearing denied Feb. 8, 1906.

1. **CRIMINAL LAW**—*competency of second wife as a witness is a question for the court.* When a second wife is offered as a witness in a criminal prosecution against her husband, who, it is claimed, has another wife living and undivorced, the question of her competency is for the court, and in deciding that question the court is not only the judge of the law, but also of the questions of fact necessary to be determined.

2. **SAME**—*alleged wife is competent to testify if former wife is living.* In determining the competency of an alleged wife as a witness the court must act upon the evidence as presented at the time of the ruling, and if there is evidence establishing a former marriage of the accused and that the first wife is still living and undivorced it is not error to permit the wife of the bigamous marriage to testify, but all questions of fact as to either marriage must be left to the ultimate determination of the jury, under proper instructions.

3. **SAME**—*first marriage cannot be shown by testimony of bigamous wife.* A woman who has been married to accused is *prima facie* his lawful wife and incompetent to testify against him until the fact that the marriage was bigamous has been established, in which case she becomes competent to testify as to all matters except the fact of the first marriage, which must be established by other evidence.

4. **SAME**—*proof that first wife is living and not divorced overcomes all presumptions.* Proof that the accused had been married before and that the first wife is living and undivorced overcomes all presumptions in favor of the validity of his subsequent marriage to the person offered as a witness against him, including any presumption as to the death or divorce of the first wife.

5. SAME—*when admission in evidence of statements of accused is not error.* Admitting in evidence statements made by the accused after being warned that whatever he said might be used against him is not error, as being a violation of the constitutional guaranty against an accused person being compelled to testify against himself, particularly where none of the statements are in the nature of admissions or confessions of guilt as to the crime charged, being only explanations of certain of his acts.

6. SAME—*when remarks of court are not error.* Remarks by the court repeating correctly what a witness had just said when counsel repeated the question a second time, and in suggesting a more perfect translation of the statement of a witness who was testifying through an interpreter, are not error.

7. SAME—*court may state his conclusion as to a matter not concerning the jury.* In passing upon the admissibility of secondary evidence of the contents of a letter which the witness has stated was destroyed, it is not error for the court, when counsel said to the witness, in substance, that she could find the letter if she searched for it, to say, "It was destroyed, if I understand it correctly."

8. SAME—*corpus delicti may be established by circumstantial evidence.* While the *corpus delicti* must be clearly established, it may be proved by circumstantial evidence.

9. SAME—*what proof authorizes conviction.* Conviction of the accused of the crime of poisoning his wife is authorized where there is direct evidence of the fact of her death and that sufficient arsenic was found in her body to have produced death if administered in her lifetime, which the evidence tends, beyond reasonable doubt, to show was done, and where it is shown, by a system of exclusion, that no person other than the accused administered the arsenic, and that the accused had the arsenic in his possession, had no affection for his wife and had opportunity and motive for the commission of the crime.

10. SAME—*when sentence is a sufficient judgment.* In the absence of a statutory requirement it is not necessary that the court should, before sentence, find as its independent judgment, upon the facts, that the accused is guilty, and it is sufficient if the verdict of the jury determines the character of the crime and the penalty and the court pronounces sentence on the verdict.

WRIT OF ERROR to the Criminal Court of Cook county;
the Hon. GEORGE KERSTEN, Judge, presiding.

FRANK D. COMERFORD, and J. JULIUS NEIGER, for plaintiff in error.

W. H. STEAD, Attorney General, and JOHN J. HEALY, State's Attorney, (GEORGE B. GILLESPIE, HARRY OLSON, and THOMAS J. HEALY, of counsel,) for the People.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

Johann Hoch, plaintiff in error, was indicted in the criminal court of Cook county for the murder of Marie Walcker Hoch by poisoning with arsenic. He was found guilty by a jury and his punishment was fixed at death. The court overruled motions for a new trial and in arrest of judgment and sentenced him in accordance with the verdict. The record is before us for review upon a writ of error sued out by him, which was made a *supersedeas*.

There was practically no controversy at the trial as to the facts, and the only disagreement between witnesses was in the opinions of experts as to the cause of death. The questions to be considered by us are, whether errors prejudicial to the defendant were committed upon the trial and whether the facts proved justified the conclusion of guilt.

The facts proved are, in substance, as follows: On October 20, 1904, the defendant was married under the name of John Schmidt, in Philadelphia, to Caroline Streicher. He lived with her eleven days and deserted her on October 31. On November 8, 1904, he appeared in Chicago at the home of Johanna Reichel, who had known him about nine years and who kept a boarding and rooming house at 458 Milwaukee avenue. The next day, November 9, he went to a hotel kept by Mrs. Katie Bowers at 674 East Sixty-third street and there registered as J. Hoch, St. Louis, Missouri. He told Mrs. Bowers that he worked at the Pullman shops and was a foreman there but was away on a two weeks' vacation. He remained at the hotel ten days, and during that time, on November 16, he inquired at the Chicago City Bank, 6225 South Halsted street, for Mr. Vail, the owner

of a cottage at 6430 Union avenue, stating that he and his wife had been out house hunting, and as they came down Union avenue they noticed the house for rent. He gave the name of Mr. Hoch to Vail, who was connected with the bank, and was told that the rent was \$21.50 a month. Vail said that he did not know anything about him, and he said that he was working for Armour & Co. in the canning department; that he had twenty-five or thirty men in his employ and was getting a salary of \$125 a month; that he was moving from 646 East Sixty-third street, and that Vail could go to Armour & Co. or the place on Sixty-third street to look him up. He then showed his hands to Vail, and as they bore callous marks Vail rented the house to him without further inquiry. A lease was made out, which he signed with the name of Joseph Hoch, and he paid in advance the rent from November 16 to January 1, following. Mr. Vail went to the cottage a few days afterward, when Hoch met him and told him his wife was in Milwaukee. About November 20 the defendant bought from a house furnishing company a bill of furniture for the cottage, amounting to \$120, and told the salesman that he had been living as a widower for four years at 6430 Union avenue; that he owned the cottage and was just contemplating again entering on the sea of matrimony. He paid \$50 at that time, \$50 more the second day afterward and \$20 when the furniture was delivered at the house. A few days afterward, on December 3, he published in the *Abend Post*, a German evening paper published in Chicago, an advertisement in German, of which the following is a translation:

"*Matrimonial*.—Widow, without children; the end of the thirties; German; own home; wishes acquaintance of a lady; object, matrimony. Address M422, *Abend Post*."

Marie Walcker was about forty-six years of age and had been divorced from her first husband. She had made her living by washing, house cleaning and doing general work. At the time the advertisement was published she owned a little

candy store at No. 12 Willow street. She answered the advertisement by a letter written for her by her sister, Bertha Sohn, a translation of which is as follows:

*"Dear Sir—*In answer to your honorable advertisement, I hereby inform you that I am a lady standing alone. I am forty-five years of age. I have a small business, also a few hundred dollars—a little fortune—a few hundred dollars. If you are in earnest I tell you I shall be. I may be spoken or seen at any time during the day. Address No. 12 Willow street.

MARIE WALCKER."

In response to the letter defendant came to the candy store on Tuesday, December 6. He stated to Marie Walcker that he was looking for a wife; that his wife died two years previous after a sickness of eighteen years; that he was a rich man, with \$8000 in money, a nice house and a big lot on Union avenue. She told him if that was true it was all right. There was a bed-room and a kitchen back of the store, and the defendant drank coffee in the kitchen during the afternoon with Marie Walcker and a friend, Mrs. Knipple, and defendant talked about his wealth and asked Marie Walcker if she liked him, and she replied yes, if he liked her. On the next day, Wednesday, he called again at the store and took Mrs. Walcker out to show her his house and lots. They went about ten o'clock and returned about four in the afternoon, leaving Mrs. Knipple in the store. He visited the candy store again on the 8th or 9th and took supper there, and again talked about his property and his wealth, and spoke about having paid \$500 to fix up his house, and that his father, in Germany, was a very old man and he would be an heir of \$15,000. On Saturday, December 10, defendant came to the store to go to the court house for a marriage license and to be married. Mrs. Walcker had \$270 in a savings bank and \$80 hid under the mattress in her bed. She told her friend, Mrs. Knipple, to take good care of her money, and Mrs. Knipple said she had better take the money along. She had sold the store that morning for \$75, and she gave that money to the defendant, and the \$80 she had hid under the mattress, and her bank book. They then went

down town and were married, and went to the bank, where Mrs. Hoch drew the \$270 and gave it to the defendant. They then went to the home of the sister, Bertha Sohn, at 423 Sedgwick street, and remained until about eleven o'clock. On the following Monday, December 12, defendant and Mrs. Hoch came to Sohn's about noon and remained until nine or ten in the evening. Mrs. Hoch had another sister, Mrs. Amelia Fischer, with whom she had not been on good terms, and on that visit it was stated that Mrs. Fischer had left nine children in Germany with only ten marks and had come to America and brought one child and about one thousand marks with her. Defendant condemned the conduct of Mrs. Fischer, and in the conversation learned that she had money in the same bank as Mrs. Hoch. Mrs. Fischer lived at 372 Wells street, in a flat, where she let rooms. About the same time defendant and Mrs. Hoch went to the house of Ella Held, at 241 Vine street, to learn the address of Mrs. Fischer. It happened that Mrs. Fischer was at the house when they came and Mrs. Held introduced her to Mr. Hoch. At his request the two sisters shook hands and became friends again. During that week Mrs. Knipple called at 6430 Union avenue with her two daughters and found Mrs. Hoch sitting in a rocking chair quite sick and pale, with sunken eyes. On Sunday, December 18, Mrs. Sohn and her family went to defendant's house and found her sister looking very badly, and she had eruptions about her mouth. The next day defendant and Mrs. Hoch came to visit Mrs. Sohn, and Mrs. Hoch had the eruptions about her mouth and looked very yellow, and had to run to the closet very frequently. Mrs. Sohn invited them to spend the holidays there with them, but the defendant would not promise, saying many things might happen. On Tuesday, December 20, the defendant inquired at a drug store for a doctor, and Dr. Joseph Reese, who had an office there, was recommended. He called Dr. Reese to attend Mrs. Hoch, and the doctor found her complaining of severe pains in the

lower abdominal or pelvic region, and unable to control the urine and suffering great pain and burning from it. The defendant purchased at the drug store a two-quart fountain syringe and rubber sheeting for the bed. The doctor gave a prescription to relieve the symptoms which manifested themselves, and from that time up to and including January 10 he called on the patient daily and prescribed from time to time. About the commencement of the illness defendant went to a saloon and got a quart bottle of seltzer water, and told the bar-tender to keep plenty of it on hand. He got seltzer water at different times, amounting to four quarts in all, which Mrs. Hoch drank, but the doctor said he did not direct him to give her seltzer water. On Wednesday, December 21, Mrs. Sohn received a letter from defendant, saying that his wife was sick and that the doctor had ordered injections, and requested Mrs. Sohn to go to Mrs. Knipple and see if she would come to the house. Mrs. Sohn thereupon went to the house and found her sister in bed, appearing to be very ill. She complained of fearful pains in the abdominal region and Mrs. Sohn understood that the urine was suppressed. The defendant said that the doctor had ordered the body to be flushed out with soap and water and salt, and he prepared an enema and produced the syringe with which Mrs. Sohn administered it. After that, frequent enemas were given during the entire illness. The doctor did not prescribe or direct the giving of them, but on one occasion when a nurse, who had been told that the doctor prescribed them, spoke to him about it, he assented or said to give her enemas when necessary. Before her marriage Mrs. Hoch had been in uniform good health, and, although not particularly robust in appearance, was healthy and able to do hard physical labor and had not suffered from anything except an occasional headache. Her symptoms continued practically the same until her death. She suffered great pain in the abdomen, with incontinence of urine and a burning sensation from it. She was pale and yellow and vomited frequently,

most of the time being unable to retain anything on her stomach. She was very restless and nervous and had a violent thirst. Her tongue was coated and there were eruptions about her mouth, and she had frequent fainting spells and great weakness. Her temperature was normal or below normal, and she had a tingling sensation in the extremities and felt as though ants were crawling through her body. In addition to the seltzer water she drank a great deal of water and iced milk and some coffee and soup, but she usually vomited up whatever she drank.

Two or three days after the first visit of Mrs. Sohn the defendant again wrote her, requesting her to come to the house, saying that no improvement had taken place in his wife's condition; that she must recover if it cost him thousands and thousands of dollars; that he thought he had a healthy wife, and that he had had very much misfortune in his life in that way and now it had happened again. Mrs. Sohn went to the house and found her sister very sick with the same symptoms as before, and in great pain. The defendant told her that the doctor had ordered enemas, and she gave one which was prepared by the defendant. Mrs. Hoch was taking pills, which defendant said were given to induce sleep. Her pains were very severe and she complained of a crawling sensation. She was given coffee by the defendant, and he also made some broth, of which they all partook, but Mrs. Hoch vomited it up. Mrs. Fischer received two letters from the defendant, and after receiving the second one went to see her sister and found her complaining of great pain in the lower part of the stomach, and the defendant then said that she had some kind of kidney disease. Defendant complained that his first wife had been sick eighteen years and that he thought he had now got a healthy woman but was disappointed. After her return home Mrs. Fischer sent her picture to her sister and the defendant as a New Year's present. Mrs. Fischer then received a letter from the defendant expressing thanks for the picture and saying that he was

going to carry it on his breast, and that she should send another to her sister. The doctor diagnosed the trouble as nephritis, which is another name for inflammation of the kidneys or Bright's disease, and cystitis, which is inflammation of the bladder. He wanted a professional nurse, and one was employed on January 5 who remained until the night of the 10th. By direction of the doctor she irrigated the bladder by the use of a catheter and gave douches of hot water, and while there she also gave enemas and cared for the patient. On the 6th or 7th of January Mrs. Fischer came again, when the defendant said that he had kept her picture for himself, and she said that the picture was for both of them. Mrs. Hoch was then very thirsty and spoke of the crawling and an itching in the fingers, and complained of pain, and vomited often. On that occasion defendant accompanied Mrs. Fischer to the car, and on the way said that if he had met her four weeks sooner he would have married her. The next day Mrs. Fischer came again and found her sister in the same or a worse condition. She vomited a good deal and could not retain either water or milk. On one of her visits Mrs. Fischer brought a squab for her sister, and it was cooked and the patient ate some of it. A few days after the nurse came Mrs. Hoch wanted to have her discharged on account of the expense, and the defendant saw the doctor about it and she was retained. The defendant was very attentive to his wife during the whole illness, and would kiss her in the morning and call her endearing names, and expressed great anxiety that she should be cared for regardless of expense. Mrs. Fischer was there a number of times and prepared food and did washing and ironing, and about January 10, before the nurse left, Mrs. Hoch became jealous of her sister and of defendant's attentions to her. The nurse left on the evening of January 10, but expressed a willingness to come back if she was wanted, provided Mrs. Fischer was not there. After the nurse left, the doctor did not return until the morning of January 12, af-

ter Mrs. Hoch was dead. During the sickness Mrs. Knipple called, and Mrs. Hoch asked the privilege of talking to her alone, but the defendant would not permit it. On the evening of January 11, the next day after the nurse had gone, Mrs. Hoch said to the defendant to go and marry Mrs. Fischer,—to marry her after she was dead. She called Mrs. Fischer a human sow, and told her that she could take him. Mrs. Fischer was offended and declared that she would never cross the threshold again, but it was finally decided that she should stay there that night, and she went down-stairs and laid down on a lounge. She heard high words between the defendant and Mrs. Hoch, who said to him that he could go and take her and marry her if he wanted to and could marry her after she was dead. About 5:30 in the morning of January 12 the defendant came down-stairs and told Mrs. Fischer that his wife was worse and that he was going for the doctor. He was gone for a while and telephoned the doctor, and when he returned he went up-stairs and told Mrs. Fischer to come up. Mrs. Hoch was lying there dead. On that morning defendant and Mrs. Fischer took out the bed clothes and were straightening things up about the house when the defendant proposed marriage to her. Mrs. Fischer replied that her sister was not buried yet and it was not time to talk about a matter of that kind, but the defendant said that that made no difference,—that the dead belonged to the dead and the living to the living. Mrs. Fischer declined to answer at that time. Defendant said that he was a man of means, worth about \$30,000 or \$40,000; that he would rent the house for \$25; that the house cost him \$4000, of which he paid \$3000 in cash and owed \$1000. He took out a paper and read from it to justify his statement, and marked out a corner lot, claiming that it contained six or eight lots in one, and said that he intended to rent the cottage until Mrs. Fischer's family came back from Germany, and then he would build a three-story brick house on the corner; that they would open a hotel and would run it

together, and he hoped they would be able to arrange everything within a week. He said it would be better to keep everything quiet in regard to the marriage and they would go to Germany for a trip. The doctor made a death certificate stating that nephritis and cystitis were the cause of death. The funeral took place on Sunday, January 15, and the body was buried in Oakwoods cemetery. After the funeral Mrs. Sohn spoke to the defendant about some insurance of \$75 of the deceased, on which the premium was ten cents a week. He said that he did not believe the insurance premiums had been paid during the sickness; that he did not want to make any money out of the woman; that if there was any money she could have it; that if he had died his wife would have received about \$25,000, as he had made her his sole heir. The next day, Monday, January 16, the defendant and Mrs. Fischer agreed to be married, but the defendant said he could not go away until the matter of the house was settled, and that he owed \$1000 and could not rent it until he had paid it. Mrs. Fischer said if there was no other way out of it she had a little money. Defendant said that his father lived in Paris and they would go from there to Germany, and he would inherit from \$15,000 to \$20,000 from his father, who was eighty-one years old. He promised her by all that was holy to re-pay her money as soon as he got his money from some vacant lots. She had in the bank \$893, of which \$750 belonged to her and the rest to her daughter. Defendant said that he did not want to receive the money until they were married. They were married at Joliet on Wednesday, January 18, and the next day they went to the bank and she drew \$750, which she gave to him. He said it would be better if she got the money on that day, as he could pay his bills on the house and get it rented. They then went to 372 Wells street, to Mrs. Fischer's flat. Mrs. Sauerbruch, who occupied one of the flats, opened the door and met them in the hall and told them not to go in there; that Mrs. Sohn was in there and was talk-

ing about defendant and said that he poisoned her sister; that he was a swindler, and that she had found out a good deal about him. He was agitated, and Mrs. Fischer Hoch told him if he was not conscious of any wrong he ought to go in, but he said that he would not come in just now,—that he was feeling badly and would sit down for a minute. He remained in the parlor and Mrs. Fischer Hoch went into the other room, but returned in a few minutes and found that the defendant had gone. The defendant went to the boarding house of Johanna Reichel, on Milwaukee avenue, before referred to, and then absconded. He was found at No. 546 West Forty-seventh street, New York City, under the name of Henry Bartells. Among other effects in his possession there was a fountain pen. There was no pen in the holder and it was not used as a pen, but the reservoir contained fifty-eight grains of arsenic. On January 21, two days after the scene at the flat, the body of Mrs. Walcker Hoch was exhumed and a post-mortem examination was held, when the stomach, with the contents, kidneys, liver and spleen were removed. There were no more changes in the vital organs than are quite frequent in persons of her age and none of them showed any disease sufficient to cause death. In the stomach arsenic was present in the proportion of 7.6 grains in the entire stomach and $1\frac{1}{4}$ grains in the liver. The body was again exhumed on April 24, 1905, when half of the bladder, a portion of the heart and a large portion of the intestines were removed and afterward examined. Arsenic was found, in the form of a white powder, in the folds of the colon, mingled with blood and mucus. The body had been embalmed with letheform, which does not contain arsenic, and the embalmer had not had or used any embalming fluid which contained arsenic. None of the medicines given or prescribed by the doctor contained arsenic, and the testimony excluded the administration of poison during the entire illness by any other person than the defendant. Two grains of arsenic is sufficient to produce

death, and the amount found in the body of the deceased would be certain to cause death.

Defendant stated at different times after his arrest that the arsenic in the fountain pen was tooth-powder, but after he was told that it would be examined he said that it was of no use,—that it was arsenic; that he intended to commit suicide when he was informed that he was charged with bigamy, but when he was charged with murder he concluded he would come back and face it. He said that he bought the arsenic and the fountain pen at a certain locality in New York City, but it was proved that fountain pens were not kept at the drug store at that locality and that no arsenic was sold to him at that place. All his statements with regard to his wealth, his employment with the Pullman Company or Armour & Co., his ownership of the cottage or the lot across the street, were false.

Witnesses who qualified as expert pathologists and chemists of long experience and high positions testified on the part of the People, in response to hypothetical questions presenting the symptoms of Mrs. Walcker Hoch during her illness and the existence of arsenic in her body after death, that she died from arsenical poisoning. Dr. Reese, who attended her during her illness, was a witness, and regarded all the symptoms as consistent with and pointing to his diagnosis of nephritis and cystitis, but conceded that his opinion had been formed with no knowledge or suspicion of the presence of arsenic, and his judgment was, that if the arsenic was administered while the patient was living, her death was due to arsenical poisoning. One witness testifying as an expert on the part of the defendant, said that, taking into consideration the symptoms and manifestations during the illness, and assuming that the arsenic was given to the deceased during her lifetime, a suspicion would be aroused in his mind that her death was due to the arsenic, but that at most he would have only a suspicion, which would not amount to an opinion. His opinion was that the presence

of the arsenic did not prove anything and the hypothesis of fact embraced in the question propounded to the experts did not warrant a conclusion as to the cause of death. He could not say of a certainty from the hypothesis of fact that the person did not die of sunstroke, shock due to uremic poisoning, diphtheria, scarlet fever, appendicitis, fright or tuberculosis, and he testified that the arsenic, including that which appeared as a white powder in the folds of the colon, might have been absorbed from the soil of the cemetery, in which other embalmed bodies had been buried. His testimony was contradictory of that given by the other experts, and it seems to have been discredited by the jury upon good grounds.

The first occurrence of the trial which is assigned as error is the ruling of the court that Amelia Fischer Hoch was a competent witness. She was sworn and an objection of the defendant to her competency was overruled and she testified in the case. The wife of a defendant is not a competent witness against him because of the importance to society of preserving the sanctity and harmony of the marriage relation. (*Hyman v. Harding*, 162 Ill. 357.) But a bigamous marriage being void, the woman is not a legal wife and is a competent witness against her supposed husband. Where parties enter into the marriage relation the legal presumption is in favor of the innocence of the parties and the validity of the marriage, and Amelia Fischer Hoch having been married to the defendant, she was *prima facie* his lawful wife and incompetent to testify, but when that presumption was overcome by proof that the marriage was bigamous she became competent. Where the relation of husband and wife has been assumed, the second wife can never be admitted as a witness to prove the first marriage, because that fact must be established before she can testify at all. Where she can be a witness at all she can testify to the second marriage and other facts not including the first marriage. (*Lowery v. People*, 172 Ill. 466; *Miles v. United States*, 103 U. S.

104; 30 Am. & Eng. Ency. of Law,—2d ed.—952; 5 Cyc. 699.) If there is an issue as to the fact of the first marriage or its validity, the second wife cannot be admitted as a witness until the fact of the first marriage is established by proof. If, however, the first marriage is admitted or is clearly proved, the alleged second wife is competent to testify, with the limitation before stated. (*Clark v. People*, 178 Ill. 37; 5 Cyc. 699; 4 Am. & Eng. Ency. of Law,—2d ed.—47.) When a second wife is offered as a witness the question of her competency is for the court, and in deciding that question the court is not only the judge of the law, but also of the questions of fact necessary to be decided to determine the question. The court must act upon the evidence as presented at the time of the ruling, and if there is evidence of a first marriage and that the wife is still living and not divorced, the fact that the witness is not the wife of the party to the suit is established and she must be admitted to testify. There may also be a question of fact for the jury as to the existence or validity of the first marriage, and the determination of that issue must in such cases be left to the jury under proper instructions; but as the second wife can not testify to any fact tending to prove a first marriage, her testimony could have no influence in the decision of that question. If the wife is properly admitted to testify, all questions of fact as to either marriage must be left to the jury under instructions as to the law and with a supervisory power of the court over the verdict. In this case the marriage to Caroline Streicher was proved, and a witness who came from Philadelphia to the trial testified that she was still living; that he saw her just before he left Philadelphia, and that she and the defendant had not been divorced. The defendant had admitted that he had never been divorced, and the testimony of the witness was not contradicted or discredited in any manner.

It is insisted that the courts will often presume in favor of a second marriage, the death of a prior husband or wife

within a much less period than that under which such a presumption ordinarily arises, and that they will often presume a divorce in order to sustain a second marriage,—and both propositions are true. (*Cartwright v. McGown*, 121 Ill. 388; *Schmisser v. Beatrice*, 147 id. 210.) There are many presumptions which practically nullify each other, and under particular circumstances the conflicting presumptions cease to have any force. Where a first marriage is proved there is a presumption in favor of its validity, but where a first wife is living before a second marriage there is a presumption of the continuance of life. The force and effect of such presumptions are not well defined but depend in great measure upon the facts of a particular case, and in this case any presumptions of the death of Caroline Streicher or of a divorce were clearly overcome.

The court did not err in overruling the objection to the competency of Amelia Fischer Hoch as a witness.

It is also contended that the provision of the constitution that no person shall be compelled, in any criminal case, to give evidence against himself was violated by introducing evidence of defendant's statements. Most of the evidence referred to was not objected to at the trial, and none of the statements testified to were in the nature of admissions or confessions of guilt. When the defendant was taken into custody in New York he was taken to police headquarters, where he was questioned by a police inspector, who stated to him that he was going to ask him some questions; that he need not answer them unless he wanted to, and that anything he might say might be used against him at his trial. He then gave his name as John Joseph Adolph Hoch, stated his age and residence in Chicago, and said that he would answer any questions put to him. He did not confess anything, but said that he gave the name of Henry Bartells in New York because he did not want his sister-in-law, with whom he had some difficulty about some property in Chicago, to find out where he was. A police officer offered him the fountain

pen, and he reached to take it, but drew back and said he had no pen. He was remanded for forty-eight hours, and going over to court on the morning of February 2 he was told about the white powder in the fountain pen and said it was tooth-powder. These are the material statements made in New York, and when proved on the trial no objection was made. On the train, coming from New York, a police officer told defendant that they would have the contents of the fountain pen analyzed to find out if it was tooth-powder, and the defendant then said it was no use analyzing it,—that it was arsenic. When he was brought to Chicago he was interrogated at the police station by an assistant State's attorney and others, and made statements that he had never been divorced, and told where he bought the arsenic and the fountain pen. He said that he got the arsenic for the purpose of committing suicide, and told the clerk from whom he bought it that he used it as medicine and was going to take a little bit. No objection was made to that evidence. There was a written statement which was objected to and the objection was overruled. It was made by the defendant to the police in Chicago, and in it he narrated some events of his life, such as when he came to America, and his movements, and his marriage with Mrs. Walcker, and her death. Neither in that statement nor any other did he make any confession but only offered explanations. He was cautioned in New York that anything he might say could be used against him, and he was at no time put in fear or offered any inducement to make any statement. There is no ground whatever for saying that the statements were obtained by any improper or unfair methods, and the constitutional right of the defendant was not violated in letter or spirit.

It is also argued that the court made improper remarks in the presence of the jury with regard to the testimony, which were prejudicial to the rights of the defendant. Upon the examination of Mr. Vail, from whom defendant rented the house, he was asked if the defendant said anything else

about his wife, and the attorney for defendant objected to leading the witness and apparently was commencing an argument on the subject, to the effect that if the witness was intelligent he could answer without being led, when the court said: "It does not make any difference whether he is intelligent or otherwise." The question was not leading and there was nothing prejudicial to the defendant in what was said, since it did not relate to any fact in the case and could not have influenced the jury. The next two instances of remarks by the court were merely correct statements of what a witness had said. Mrs. Knipple, testifying to the appearance of Mrs. Hoch, said that the color of her face was all gray and yellow,—all kinds of color. Counsel for defendant asked this question: "Well, I know, but what was the color of her face?" The court said: "She said all kinds of color." It was a correct statement of what the witness had said and was not an expression of opinion, but only a statement that the witness said it was all kinds of color. The next remark occurred on the examination of Bertha Sohn. Like a number of other witnesses she spoke German and was examined with the aid of an interpreter. She said that Mrs. Hoch was thirsty, but took a drink and vomited it, and complained of fearful gripping of the fingers. The next question put was, "Fearful what?" The interpreter in reply said: "Gripping, twitching, perhaps gripperlin." The court, who counsel say understood German, said to the interpreter in an interrogative way, "Sort of crawling sensation?" and the interpreter replied, "Crawling sensation." The witness further answered that she did not say it was painful, but it was as though her whole body was full of crawling ants. All that the court did was to aid in a more perfect translation of the answer, and the interpreter admitted the correctness of the translation by the court. There was no error in either case in correctly stating what the witness said. The next remark complained of was about a matter with which the jury had nothing to do. Amelia Fischer

Hoch was being examined with reference to the contents of a letter which she had testified had been destroyed. Counsel for the defendant was objecting, and said to the witness: "You have not yet made a search for the letter; you can find it." The court said: "It was destroyed, if I understand it correctly." Counsel said that she had not stated that she had made any search for it, and the court said: "It was destroyed." The witness said: "I said before, all the letters were destroyed except the ones which were produced." The court was not commenting on any fact to be submitted to the jury, but was passing on the admissibility of secondary evidence of the contents of the letter. The question of fact whether the letter had been destroyed was for the court, and it was entirely proper for him to state his conclusion on that subject. There was no error in any remark of the court.

Objection is made in argument to a hypothetical question propounded to the expert witnesses, on the ground that it was not a true statement of the symptoms of Mrs. Hoch and the facts in the case. It is said that it incorrectly assumed that a woman of previous uniform good health, who had for a long time been able to do washing and ironing and had never had any sickness except an occasional headache, was suddenly taken ill on December 20, that there was a suppression of urine and that she had no appetite. None of these objections are valid and the hypothetical question fairly stated the evidence. The only evidence was that Mrs. Hoch had been a healthy woman and had made her living by washing, house cleaning and similar work, and had saved money from her earnings. There was evidence that defendant had stated to the undertaker that she had died of kidney disease; that she had deceived him by saying that she was healthy, and he had found out that she had been doctored for that trouble by a doctor on the north side for many years. There was no evidence that any doctor on the north side had ever treated her and no evidence tending to prove

that the defendant's statement was true. There was evidence that she told her sister, Mrs. Sohn, that she had the retention or suppression referred to when Mrs. Sohn first came there, although subsequently the opposite condition undoubtedly existed. The hypothetical question covered both of those conditions. As to the question of appetite, there was evidence that she had no appetite but had a consuming thirst. She ate some of the squab and took soups and coffee and drank a great deal of milk and seltzer water, but retained scarcely anything on her stomach. Although the objections now made to the hypothetical question do not seem to have been made at the trial we find no objection to it.

It is assigned as error that the court refused to give instructions numbered 68, 70, 81 and 85 asked by the defendant. No. 85 was a peremptory instruction to find the defendant not guilty, and the foregoing statement of the evidence shows that it was properly denied. The other instructions related to the degree of proof required to warrant a conviction of a criminal offense upon circumstantial evidence alone. The rules of law contained in those instructions were the same that were given to the jury in instructions numbered 41, 51, 58 and 59, in which the same principles were repeated in varying forms and language. It was not error to refuse the instructions, which were substantially duplicates of those already given.

It is also contended that the evidence being circumstantial the guilt of the defendant was not established by that degree of proof which authorized a conviction. It is insisted that it was not proved beyond a reasonable doubt that Marie Walcker Hoch came to her death by the administration of arsenic through criminal agency, or, in other words, that the *corpus delicti* was not proved. The *corpus delicti* is made up of two essential elements: the fact of death, and the criminal agency of some person as the cause of death. (*Campbell v. People*, 159 Ill. 9.) The *corpus delicti* must be clearly established, (12 Cyc. 382,) but it may be proved by

circumstantial evidence. (*Campbell v. People, supra.*) The death of Marie Walcker Hoch was proved by direct evidence, and so, also, was the fact that sufficient quantities of arsenic were found in her body after death to produce death with absolute certainty if administered in her lifetime. The claim of the prosecution was that the arsenic was administered to her in some way or introduced by injections, and probably by both methods, and the fact that it was administered or introduced into the body during life is beyond any reasonable doubt. The proof excluded any theory of contamination of the body after death, and not only was arsenic found in the stomach and liver, but in the folds of the colon it was present in the powdered form, mingled with blood and mucous. The evidence was clear that the condition in the colon was the result of a vital process, or, in other words, that the arsenic was present during life. While nephritis and cystitis produce some of the symptoms manifested, the post-mortem examination showed that there was no such change in the vital organs as could have caused death, and the proof was that the symptoms were the usual ones in cases of arsenical poisoning. It was proved that a person suffering from arsenical poisoning might live as long as Mrs. Hoch did, and her symptoms at the last indicated the administration of a deadly dose at that time. The expert who testified for the defendant that the arsenic may have come from contamination through the soil of the cemetery and the intervening obstacles was contradicted, and in view of facts within the common knowledge his testimony did not raise a reasonable doubt of the criminal administration of the arsenic during life. It was even proved that the arsenic did not come from wall paper of the room where the deceased died, which was analyzed for the purpose of ascertaining the fact.

There cannot be any reasonable doubt that Marie Walcker Hoch came to her death from arsenic administered through the criminal agency of some person, and all the facts and circumstances pointed directly to the defendant as

the criminal agency. Among the facts which convinced the court and jury that he was the criminal agent were his numerous false statements and explanations; the evident absence of any conjugal affection, as shown by his conduct toward Mrs. Fischer and his proposal of marriage immediately upon the death of his wife; the possession of the arsenic; the motive of gain; the prospect of marrying Mrs. Fischer; his conduct and manner when he became aware of the charge of Mrs. Sohn against him, and all the facts and circumstances proved on the trial. By a system of exclusion it was proved that no other person administered the arsenic; that there was none in the medicines prescribed by the doctor or in the food or liquids prepared by any other person.

The court did not err in overruling the motion for a new trial.

The last point covered by the assignments of error is, that the judgment is insufficient because it fails to show an adjudication by the court that the defendant was guilty of the crime for which he was sentenced. After the court overruled the motion in arrest of judgment and an exception was taken to the ruling, the record is as follows: "And now neither the said defendant, nor his counsel for him, saying anything further why the judgment of the court should not now be pronounced against him on the verdict of guilty heretofore rendered to the indictment in this cause, therefore the sentence of this court is that you, the said Johann Hoch, otherwise called John Hoch, otherwise called Schmidt, be taken from the bar of this court to the common jail of Cook county, from whence you came, and there be safely and securely kept and confined until the 25th day of June, in the year of our Lord one thousand nine hundred and five, and on that day, between the hours of ten (10) o'clock in the forenoon and two (2) o'clock in the afternoon, you, the said Johann Hoch, otherwise called John Hoch, otherwise called Schmidt, be by the sheriff of Cook county, according

to the law, within the walls of said jail or in a yard or inclosure adjoining the same, be hanged by the neck until you are dead. And the sheriff of said Cook county is further instructed and commanded to carry into full effect and execution the judgment of this court in accordance with the laws of the State of Illinois; and may God have mercy on your soul." The argument is, that in order to make a valid judgment the record must show the *ideo consideratum est*, or, in other words, it must be considered by the court that the defendant is guilty of murder. If that position were correct, the proceedings would only be set aside back to the point where the error was committed and the cause would be remanded for a proper judgment on the verdict. (*Harris v. People*, 130 Ill. 457; *Wallace v. People*, 159 id. 446.) But we are of the opinion that the judgment was legal and valid. The whole record is to be considered, and if from the whole record it is apparent that the court found the defendant guilty of the crime and sentenced him to the punishment fixed by the law and the verdict, that is all that is required. It is necessary that the record should show that there was a sentence upon the verdict, but if it was necessary that the court approve the verdict, it was done by overruling the motion for a new trial. In the absence of a statute it is not necessary that the court should before sentence find as its independent judgment, upon the facts, that the accused is guilty. (12 Cyc. 778.) If the court states the finding of the jury and pronounces sentence thereon, that is a judicial determination of the fact of defendant's conviction and is all that is required. (*Davis v. Utah Territory*, 151 U. S. 262.) The verdict in this case determines the character of the crime and the penalty, and the sentence upon the verdict is an adjudication by the court and is sufficient as a judgment. *Murphy v. People*, 188 Ill. 144; *State v. Cook*, 92 Iowa, 484.

We have considered every question presented by counsel for plaintiff in error, whether objection was made or excep-

tion saved upon the trial or not, and have disregarded any failure to object to any evidence or ruling or to except to any ruling.

There is no error in the record and the judgment is affirmed.

Judgment affirmed.

ELVIRA E. HARROW

v.

JEREMIAH GROGAN *et al.*

Opinion filed December 20, 1905—Rehearing denied Feb. 8, 1906.

1. MORTGAGES—*when mortgage is presumed to be for purchase money.* A mortgage by a grantee to his grantor, executed, acknowledged and recorded on the same day the deed between the parties was made, will be presumed, in the absence of evidence to the contrary, to be a purchase money mortgage, and the mortgagor's widow, even though she did not sign the mortgage, is not entitled to dower as against the mortgagee and those claiming through him.

2. PARTIES—*wife not a necessary party to bill to foreclose purchase money mortgage.* A wife is not a necessary party to a bill to foreclose a purchase money mortgage executed by her husband but in which she did not join.

3. JURISDICTION—*on collateral attack the presumptions are in favor of jurisdiction.* When a foreclosure decree is attacked collaterally, the specific objection to jurisdiction being that the defendant was notified to appear on the second instead of the first Monday of the term, if there was ample time between the time the defendant was notified to appear and the time the decree was rendered for the defendant to have been served with process, by summons or publication, it will be presumed such service was had.

4. BRIEFS—*new points cannot be raised in reply brief.* Points relied upon for reversal should be urged in the original brief of the appellant or plaintiff in error and cannot be urged for the first time in the reply brief, and when so urged will be disregarded.

APPEAL from the Circuit Court of Cook county; the Hon. MURRAY F. TULEY, Judge, presiding.

SAMUEL B. KING, and JULE F. BROWER, for appellant.

ROSENTHAL, KURZ & HIRSCHL, (FRANCIS J. HOULIHAN, of counsel,) for appellees.

Mr. JUSTICE HAND delivered the opinion of the court:

This was a petition filed by the appellant in the circuit court of Cook county, praying for the assignment of dower to her in block 13, in canal trustees' subdivision of section 7, township 39, north, range 14, east of the third principal meridian, Cook county, Illinois, as the widow of Thomas A. Harrow, deceased. The persons in possession of said premises, as owners or otherwise, were made parties defendant, and answers and replications having been filed, a trial was had in open court and a decree was entered dismissing the petition at the petitioner's cost, and she has prosecuted an appeal to this court.

It appears from the evidence that Thomas A. Harrow purchased said premises from Samuel M. Hart on the 23d day of February, 1854, for the consideration of \$12,000, and on that day received a warranty deed therefor from Hart and wife, which was filed for record and recorded in the recorder's office of Cook county on March 3, 1854, and on the same day said warranty deed bears date Harrow executed his four promissory notes to said Samuel M. Hart for a sum aggregating about the sum of \$10,000, which were secured by a mortgage given by Harrow (which the petitioner did not sign) to Hart on the said premises, bearing even date with said deed, and which mortgage was recorded in the recorder's office of Cook county on March 3, 1854. Harrow made default in the payment of a part of said notes, and on June 4, 1857, the Farmers' Bank of Kentucky and others filed a bill against Harrow and others in the Cook county court of common pleas, which ripened into a decree foreclosing said mortgage and ordering a sale of said premises

to satisfy said decree, and on March 29, 1858, said premises were sold by the master in chancery of said court to one Burdsal for the sum of \$7347.39 in satisfaction of said decree, which sale was approved by the court and a certificate of sale was issued by the master to Burdsal. On March 18, 1859, Rachel Thurston recovered a judgment against Thomas A. Harrow in the circuit court of Cook county for the sum of \$8019.81. On June 29, 1859, Rachel Thurston, as a judgment creditor of Thomas A. Harrow, redeemed from said foreclosure sale of March 29, 1858, by paying to the master the sum of \$8265.81, and the sheriff of Cook county thereupon levied upon said premises by virtue of an execution then in his hands, issued upon said judgment in favor of Rachel Thurston against Thomas A. Harrow, and said premises were re-sold by the sheriff, under said execution, to Hiram A. Tucker (to whom Rachel Thurston had assigned the certificate of redemption and said judgment against Thomas A. Harrow) for the amount of said redemption money, and the sheriff executed a deed to Hiram A. Tucker. It is admitted that the petitioner was married to Thomas A. Harrow on October 6, 1853; that Thomas A. Harrow became seized of said premises on March 3, 1854, and that Thomas A. Harrow died on the first of September, 1890, and that the petitioner is entitled to dower in said premises unless she was barred thereof by said mortgage and the foreclosure and sale under the decree foreclosing the same, and the redemption from said sale and the re-sale of said premises to Thomas A. Tucker under said Thurston judgment. The question, therefore, here presented for decision is not whether the appellant was *prima facie* entitled to dower in said premises, but was a bar to her claim of dower shown by the defendants?

The first question which presents itself for consideration is, was the mortgage from Thomas A. Harrow to Samuel M. Hart a purchase money mortgage? If it was not, the petitioner is clearly entitled to dower in said premises. If it was

and the present owners of said premises took title through said mortgage and its foreclosure was regular, then she is barred of her dower. The petitioner testified her husband purchased said premises of Samuel M. Hart for \$12,000 and that at the time of the sale he paid only a part of the purchase money; that she did not know how the balance of the purchase money was paid, but thought it was assumed by Rachel Thurston. In June, 1857, Thomas A. Harrow, the then owner of the premises, filed a bill in chancery against Samuel M. Hart and others in the circuit court of Cook county to enjoin the foreclosure of said mortgage by *scire facias*, in which bill he alleged said mortgage was given to secure the payment of a portion of the purchase money of said premises due Hart, and the bill filed to foreclose said mortgage; also alleged, although the decree is silent upon that point, that the mortgage was a purchase money mortgage. It also appeared that the purchase of said premises was the only purchase of real estate ever made by Harrow from Hart, and upon a trial of this case no other mortgage was shown to Hart from Harrow or Thurston in the chain of title to said premises, although at the hearing there was a complete abstract of title of said premises present. The controlling fact, however, is, that the deed from Hart to Harrow and the mortgage from Harrow to Hart bore the same date and were filed for record the same day. In *Gibson v. Brown*, 214 Ill. 330, it was held that the court would presume, from the fact that a deed and mortgage were made covering the same land on the same day between the same parties, that the mortgage was a purchase money mortgage; and in *Cunningham v. Knight*, 1 Barb. 399, that where, on the purchase of land, a deed is executed by the vendor and a mortgage on the land purchased is executed by the purchaser, and both conveyances are acknowledged and recorded at the same time, the presumption is that they were executed simultaneously and that the mortgage was intended to secure the purchase money, and that the purchaser having incidental seizin only,

his widow was not entitled to dower as against the mortgagee; and in *Ruffner v. Evans*, 2 Ohio Cir. Ct. 70, that where a grantee, on the date of the conveyance, gave a mortgage on the land to the grantor, the coincidence of date of deed and mortgage justifies a presumption that they were part of the same transaction and that the mortgage was given to secure the unpaid purchase money, and that, as against the mortgagee, the widow of the grantee is not entitled to dower.

The presumption that a mortgage executed by the vendee to the vendor on the same day upon which the land is conveyed by the vendor to the vendee is a purchase money mortgage is not a conclusive presumption, but is rebuttable. Here, however, the presumption is not rebutted but is strengthened by other facts appearing in evidence, among which are the facts that at the time Harrow purchased the premises in question he paid only a part of the purchase money, and that afterwards, and while Harrow still retained the title, he filed a bill in which he alleged the mortgage was a purchase money mortgage. We are of the opinion the chancellor properly held, in view of all the evidence found in this record, that the mortgage from Harrow to Hart was a purchase money mortgage, and that, as against that mortgage, the petitioner was not entitled to dower.

The petitioner contends she was not a party to the suit in which the Hart mortgage was foreclosed and is not bound by that decree. She also urges that said foreclosure decree was not binding upon Thomas A. Harrow by reason of the fact, as she alleges, he was not properly notified of the pendency of said suit. The mortgage being a purchase money mortgage the petitioner was not a necessary party to the foreclosure suit, (*Lohmeyer v. Durbin*, 206 Ill. 574,) and the Cook county court of common pleas being a court exercising common law and chancery powers, while in the exercise of such powers all intendments and presumptions must be indulged which are necessary to sustain its decrees, unless the want of jurisdiction is made to appear. *Swearengen v.*

Gulick, 67 Ill. 208; *Barnett v. Wolf*, 70 id. 76; *Nickrans v. Wilk*, 161 id. 76; *Bradley v. Drone*, 187 id. 175.

The specific objection urged against jurisdiction as to Thomas A. Harrow is, that he was notified by publication to appear in said foreclosure suit on the second, instead of the first, Monday of September, 1857. The decree was not entered until February 8, 1858, and ample time intervened between the second Monday of September, 1857, and that date, for the complainants to have obtained service, either by summons or by publication, upon Thomas A. Harrow, and upon this a collateral attack the court, in order to sustain such decree, will presume such service was had. *Wells v. Mason*, 4 Scam. 84; *Kenney v. Greer*, 13 Ill. 432; *Wallace v. Cox*, 71 id. 548; *Benefield v. Albert*, 132 id. 665.

It is next urged the sheriff's deed to Tucker appears to have been a "duplicate," and that the same was issued eight years and one month after the sale to Tucker. The words found in the abstract of title which indicate the deed to have been a duplicate must be disregarded as surplusage, or the presumption obtain that there was an order of court authorizing the sheriff to execute a deed in lieu of a former deed which was lost, as it will not be presumed, in the absence of proof, that the sheriff wrongfully issued said deed, and the fact that the deed was issued more than eight years after the execution sale did not destroy its effect as a conveyance against Harrow or his heirs, (*Cottingham v. Springer*, 88 Ill. 90,) and we are of the opinion the deed should be held to have the same effect as against appellant.

It is, however, said the sheriff's deed to Tucker was not introduced in evidence. The foreclosure decree, the sale thereunder, the redemption from said sale and the re-sale under the Thurston judgment, and the making and recording of the sheriff's deed to Tucker, all took place prior to the great fire of 1871, when the records of Cook county were destroyed, and the only evidence found in this record of those transactions appears from extracts from certain ante-

fire abstracts, which, by stipulation of the parties, were read into the record. It clearly appears that the memorandum of the sheriff's deed to Tucker, found in said abstract, was before the court and was considered by the court in arriving at its decision. We are not disposed to reverse this case by reason of the fact that the memorandum of said deed appearing in the abstract was not fully incorporated in the bill of exceptions.

The counsel for appellant, in their reply brief, have advanced many reasons which, in their view, show said foreclosure and subsequent proceedings to be invalid and not a bar to appellant's dower in said premises, and have cited many authorities in support of their contentions not touched upon in their original brief or by appellee's counsel in their brief. It is not a proper practice to raise and discuss new questions, and cite authorities in support thereof, in a reply brief. Counsel for an appellant or a plaintiff in error should fully present their view in their original brief, as the office of a reply brief is to answer the contentions of counsel for the appellee or defendant in error, and not to present questions which counsel for the appellee or defendant in error, under the practice in this court, cannot have an opportunity to be heard upon. "Points relied upon for reversal must be made in the original argument of appellants or plaintiffs in error, thus giving opposing counsel an opportunity to be heard upon them, and cannot be raised for the first time in an appellate court by a mere reply brief and argument." (*Indiana Millers' Mutual Fire Ins. Co. v. People*, 170 Ill. 474.) The questions thus raised by counsel for appellant, for the reason suggested, and for the further reason that we deem them immaterial, have not been considered in this opinion.

The decree of the circuit court will be affirmed.

Decree affirmed.

PATRICK CONWAY *et al.*

v.

THE CITY OF CHICAGO.

Opinion filed December 20, 1905—Rehearing denied Feb. 8, 1906.

1. SPECIAL ASSESSMENTS—*affidavit required by section 41 need not show compliance with sections 38 and 39.* The affidavit required by section 41 of the Local Improvement act, as amended in 1901, (Laws of 1901, p. 106,) need not show that sections 38 and 39 of the act have been complied with.

2. SAME—*on supplemental assessment parties cannot attack original ordinance.* In a proceeding to levy a supplemental assessment under section 59 of the Local Improvement act, property owners cannot attack the sufficiency of the ordinance for the original assessment. (*Chicago v. Noonan*, 210 Ill. 18, distinguished.)

3. SAME—*when the question of benefits is not res judicata.* Although the original judgment of confirmation may be *prima facie* evidence that the property has been assessed as much as it is benefited by the improvement, it does not follow that this *prima facie* case is overcome, in a proceeding to levy a supplemental assessment, because the city did not have more witnesses testify than did the objectors.

4. SAME—*assessment payable in one payment cannot draw interest.* The city has no power to provide that a supplemental assessment payable in one payment shall draw interest, even though the original assessment was payable in installments which drew interest, as authorized by the statute in such case. (*McChesney v. Chicago*, 213 Ill. 592, followed.)

5. SAME—*when error in including interest does not defeat assessment.* Error in providing that a supplemental assessment shall draw interest does not defeat the assessment, where the levy for the deficit is explicit and there is nothing in the ordinance to show there are outstanding interest-bearing bonds to be paid, nor that there is any necessity of interest such as would preclude disregarding the interest provision of the ordinance and sustaining the remainder.

APPEAL from the County Court of Cook county; the Hon. ORRIN N. CARTER, Judge, presiding.

MACCHESNEY & BRADLEY, and F. W. BECKER, for appellants.

ROBERT REDFIELD, and FRANK JOHNSTON, Jr., (JAMES H. LEWIS, Corporation Counsel, of counsel,) for appellee.

Mr. JUSTICE RICKS delivered the opinion of the court:

This appeal is prosecuted from a judgment of confirmation of the county court of Cook county upon an assessment levied against the property of appellants.

The assessment proceeding was begun under section 59 of the Local Improvement act, there being a deficiency, caused by the fact that the contract price was in excess of the amount of the original estimate. The supplemental assessment is payable in one installment, and the ordinance provides that it shall bear interest at the rate of five per cent per annum. The objections urged below were, that no affidavit was filed showing a compliance with the requirements of section 41 of the act; that no estimate of the cost of the original improvement was made and appeared on the record of the first resolution; that the amount of benefits was *res judicata* by the finding and judgment in the original proceedings; that the ordinance was void in providing for interest, and that the assessment was not made in the same manner as the first.

Under the objection that no affidavit was made in compliance with the requirements of section 41 of the Local Improvement act, it is argued that an affidavit or affidavits should be filed showing a compliance not only with the provision of section 41, but with sections 38 and 39 also. It may first be remarked that the objection as filed in the court below makes no reference to sections 38 and 39, and is therefore not broad enough to cover the present contention of appellants. If treated as sufficient the objection is not tenable, as we read the statute. Section 38 requires the superintendent to make the assessment, and section 39 points out how the assessment shall be made. Section 41 relates to the making up and return of the assessment roll and the giving of certain notices to the property holders. There is no pro-

vision in the statute requiring any affidavit that sections 38 and 39 have been complied with. Section 41 contains this provision: "An affidavit shall be filed before the final hearing showing a compliance with the requirements of this section, and also showing that the affiant (either the officer making the said return, or some one acting under his direction) made a careful examination of the collector's books showing the payments of general taxes during the last preceding year in which the taxes were paid thereon, to ascertain the person or persons who last paid the taxes on said respective parcels, and a diligent search for their residences, and that the report correctly states the same as ascertained by the affiant; and said report and affidavit shall be conclusive evidence, for the purpose of said proceeding, of the correctness of the assessment roll in said particulars." (Laws of 1901, p. 107.) Appellants insist that this court should so construe the above language as to require the affidavit to cover the duties provided for in sections 38 and 39, and that unless the act be so construed the same is incongruous and incomplete, as it does not cover all the duties to be performed by the officer spreading the assessment. The proceeding is a statutory one, and the point is one of practice, and where the statute points out a particular practice and declares the effect of following it, we can see no reason for enlarging upon the statute. The first part of section 41, *supra*, after specifying what the assessment roll shall contain, proceeds: "And the officer making such roll shall certify under oath that he verily believes that the amounts assessed against the public and each parcel of property are just and equitable, and do not exceed the benefit which will in each case be derived from said improvement, and that no lot, block, tract, or parcel of land has been assessed more than its proportionate share of the cost of said improvement." As to the making of the assessment, it would seem that the legislature had clearly pointed out all that was requisite for the affidavit to contain, and that the provision

later contained in the same section and hereinabove first set out was not intended to apply to the making up of the assessment roll, but to the matters of notice and of ascertaining the names and residences of the persons who paid the general taxes for the preceding year. The superintendent of special assessments did make an affidavit in strict compliance with and literally following the provision of section 41 last above quoted, and James M. Grimm made an affidavit that at the request of the superintendent of special assessments he had made a careful examination of the books of the collector showing the payment of general taxes during the last preceding year in which the taxes were paid thereon, to ascertain the person who last paid the general taxes for the last preceding year in which the taxes were paid thereon, and also made a diligent search for the residence of such persons, and that said report correctly states the names of such person or persons and their residence, as so ascertained by affiant. And in addition to these affidavits, John A. May, the superintendent of special assessments, and other affiants, made affidavits as to the mailing, posting and publishing of notices. From a careful examination of the record we are satisfied that the proceeding was not subject to the objection so urged.

Appellants offered to prove that in the first and original resolution for the improvement, passed prior to the passage of the first ordinance, there was no itemized estimate of the cost of the improvement incorporated therein. Objection was interposed and the offered evidence was excluded. To justify the introduction of this evidence the appellants relied upon *City of Chicago v. Noonan*, 210 Ill. 18, wherein it is said (p. 21): "The additional assessment sought to be levied in this case is not a new assessment, but a supplemental one, as authorized by said section 59, and can in no sense be deemed a *de novo* proceeding." The point that was under consideration in that case and being discussed was whether the property owners were entitled to a public hearing before

the board of local improvements upon the resolution for the additional or supplemental assessment and the report of the engineer concerning the same, and the effect of the holding was, that inasmuch as the work was all completed before the supplemental assessment was levied, such assessment could properly originate by petition to the court, without a public hearing or other preliminary steps required in the original assessment. And although we there said, in effect, that the proceeding for the supplemental assessment was a continuation of the original proceeding, and not a *de novo* proceeding, the question here presented, whether defects or irregularities that might have availed the property owner in the original proceeding can be taken advantage of in a proceeding under the new ordinance for a supplemental assessment was not raised or considered. We held in that case and others that the supplemental assessment ought not and could not properly be made until the completion of the work, when the deficit was definitely known, and as the supplemental assessment can only be made upon the new and additional ordinance specially providing for it, it would seem reasonably to follow that upon mere matters of objection to the sufficiency of the ordinance the property owners should be confined to the ordinance then being proceeded under, and not be permitted to attack the prior ordinance, which had been not only adjudicated upon but fully acted under. To hold otherwise would be to jeopardize the interests of the public and make uncertain the rights of contractors who, on the faith of the confirmation of the original assessment, had proceeded with the work. So far as the sufficiency of the original ordinance is concerned, we think the property holders should be concluded by the proceedings under it, and should not be permitted to attack it in a proceeding under the ordinance for the supplemental assessment.

Appellants having objected that the original judgment was *res judicata* upon the question of benefits, the petitioner introduced two witnesses who testified that the property of

the objectors would be benefited the full amount of the assessment, and two witnesses testified for the objectors that their property would not be benefited by the proposed improvement more than the original assessment; and it is urged on authority of *Broughton v. Smart*, 59 Ill. 440, that as two witnesses testified one way and two the other, there was no preponderance of the evidence in favor of the petitioner, and that as it was held in *City of Chicago v. Noonan*, *supra*, that the former judgment was *prima facie* evidence that the property was assessed as much as it would be benefited, the court erred in holding a preponderance in favor of the petitioner and rendering judgment of confirmation. We do not agree to the contention that because two witnesses testified one way upon the main fact and two witnesses another, there was not or could not be a preponderance of the evidence. The evidence is weighed and not counted, and where the court has before it witnesses testifying in a cause, there are many things that enter into consideration in determining the weight of the testimony and reaching the conclusion upon the question of a preponderance. A jury was waived and the cause heard by the court, and we are unable to say from the record before us that the court erred in its finding in that behalf.

The ordinance for the supplemental assessment recites the passage of the original ordinance for the paving and grading of Seventy-fourth street from Yates avenue to Bond avenue, and the original estimate of the cost of \$12,500, and the confirmation and collection of the original assessment of \$12,160.70, and the letting of the contract and the completion of the work at a cost of \$15,600, and finds a deficiency of \$3439.30, and ordains that a supplemental assessment be made to pay such deficiency. Section 4 of the ordinance provides: "That the supplemental special assessment herein provided for shall be payable and shall be collected in one installment, and shall bear interest at the rate of five per cent per annum, according to the law, until paid."

It is urged by appellants that the provision in regard to interest renders the ordinance void. Appellee suggests that the ordinance is valid for the reason that it appears by the original ordinance that the assessment levied under it was made payable in installments, and that being so, the law authorized the issuance of interest-bearing bonds to be liquidated by the installments, and that it was proper in this case to require that the assessment bear interest to meet the interest on the outstanding bonds. The only provision of the act in regard to local improvements applicable to the question before us is found in section 42 of the act. We had that section before us and considered it in connection with an assessment payable in one installment in the case of *McChesney v. City of Chicago*, 213 Ill. 592, and we there said (p. 593): "That section applies only to assessments which are divided into installments, and an assessment payable in a single payment cannot be regarded as an installment of an assessment or within the language of the statute. There is no other provision that an assessment shall draw interest, and in the absence of statutory authority the city council had no right to require the payment of interest, which is never allowed unless given by statute." What was said in that case we deem applicable to the case at bar and decisive of the question of the power of the city council to provide that the assessment should bear interest.

Counsel for appellee urge that in the *McChesney case* the assessment or installment was a flat installment, in which the vouchers would bear no interest, and therefore the holding there is not applicable to the case at bar. The question is one of power, and the power must be found in the statute, if at all, and what we have said in the *McChesney case* goes directly to the vital phase of it.

It remains to determine whether the act must be held void because of the provision for interest on the assessment, or whether that provision may be disregarded and the remainder of the ordinance sustained. We have examined the

ordinance for the assessment in question, and it nowhere contains any statement that there were outstanding interest-drawing bonds to be paid or that it would be necessary to levy an assessment that should draw interest. We think the levy for the deficit was explicit, and are not embarrassed at all in determining what portion of the ordinance, if any, may be determined to be invalid or what portion might be held to be valid, as the two matters, under the provisions of the ordinance, are entirely severable. The usual test in determining whether a part of a statute or ordinance may be rejected and a part sustained, where they are severable, is to ascertain whether the legislative branch enacting the statute or ordinance would have enacted the main provision without the subsidiary or void portion. So far as appears from the ordinance itself there is no reason to believe that the city council would not have as readily passed the ordinance without the provision for interest as with it. If the claim for interest was valid at all, the city council could have provided in the ordinance for the levy of a sum sufficient to cover the principal of the bonds and the interest without providing that the assessment should bear interest. We are of opinion that the ordinance for the main deficit can be sustained, and that portion of it providing for the payment of interest on the assessment can be and ought to be rejected.

The objection that the ordinance for this assessment should have provided that it should be paid in installments, as was the original assessment, has recently been before us in *Goodrich v. City of Chicago*, 218 Ill. 18, and *Noyes v. City of Chicago*, id. 45, where in the former case it was fully considered and the contention of appellants denied.

The judgment must be reversed for the reason that the ordinance provides for interest on the assessment, and it will be remanded with directions to the county court to affirm the assessment, with an order that the same shall not bear interest as provided in the ordinance.

Reversed and remanded, with directions.

THE CHICAGO UNION TRACTION COMPANY

v.

JAMES E. O'BRIEN, Jr.

Opinion filed December 20, 1905—Rehearing denied Feb. 8, 1906.

1. TRIAL—*counsel have a right, in argument, to attack the witnesses.* In argument before the jury counsel have a right to draw any and all proper inferences arising from the evidence tending to show that the testimony of a witness is untrue, even though there has been no attempt to impeach the witness in any regular mode.

2. INSTRUCTIONS—*when instruction is erroneous as destroying effect of argument.* An instruction holding that denunciation of witnesses by counsel should not influence the jury to disregard or disbelieve the testimony of any unimpeached witness is erroneous, as practically destroying the effect of argument on the credibility of witnesses or the weight to be given their testimony.

3. SAME—*instruction holding that the law presumes an unimpeached witness has testified truly is erroneous.* There is no presumption of law that an unimpeached witness has testified truly, and an instruction so holding is erroneous as infringing upon the province of the jury, where the witnesses for one side contradict the witnesses for the other side and there is no attempt to impeach any witness.

4. SAME—*practice of injecting argument into instruction is not approved.* The practice of injecting, as an argument, into an instruction a prefatory statement of law which, though not incorrect, does not relate to any fact in the case is not approved, the purpose of instructions being to state and explain the law applicable to the facts of the case.

5. SAME—*when instruction as to duties of carrier toward passengers for hire is not unwarranted.* Giving an instruction relating to the duties of a carrier of passengers for hire is not unwarranted, even though the carrier disputes the relation, where the declaration alleges facts which, if proved, would show that plaintiff was a passenger, and where there is evidence tending to support the allegations of the declaration.

6. SAME—*question of credibility of witnesses is for the jury.* Where witnesses contradict each other and the result of the case depends upon their credibility, it is for the jury to determine which they will believe, and it is not the right of the court to take that question from them by instructions.

7. CARRIERS—*relation of passenger and carrier is contractual but may be proved by circumstances.* The relation of passenger and carrier is contractual and does not arise from the mere fact that a person runs toward a moving car to get on board, but the relation may be proved by circumstances.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. ELBRIDGE HANEY, Judge, presiding.

JOHN A. ROSE, and ALBERT M. CROSS, (W. W. GURLEY, of counsel,) for appellant.

ALEXANDER SULLIVAN, (FRANK C. KRIETE, of counsel,) for appellee.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

Appellee recovered a judgment for \$10,000 in the circuit court of Cook county, against appellant, on account of injuries received in attempting to get on a street car on West Madison street. The Appellate Court for the First District affirmed the judgment.

It is assigned for error that the trial court erred in giving, at the instance and request of the plaintiff, the sixth, seventh, ninth and eleventh instructions.

The declaration as amended contained but one count, and the only ground of liability alleged was, that while the plaintiff was in the act of getting on the car for the purpose of being carried as a passenger, the defendant negligently, suddenly and violently started up the car with great speed and violently jerked the car and caused the same to be violently propelled, by means whereof plaintiff was thrown with great force off the car and upon the ground, and thereby he was greatly hurt, wounded and injured. The car in question was a grip-car drawing two regular passenger cars, and the plaintiff attempted to board the car while the train was in motion in the middle of a block, between street crossings.

The plea was the general issue, and the defense made was, that the cable train of which the grip-car was a part, was running along at half speed between regular stopping places at a place not designed for the reception of passengers, when plaintiff attempted to board the car; that the gripman was not advised beforehand that the plaintiff would seek to get on the car, and that the car was not suddenly started forward with a violent jerk, as alleged in the declaration.

The plaintiff, a school boy fourteen years old, had gone with over forty of his schoolmates to a photograph gallery on the north side of West Madison street, about the middle of the block between Carpenter and Curtis streets, to have a class picture taken. As the boys came out of the building into the street the cable train was approaching from the east, and a few of the boys went to the Carpenter street crossing, which was the next street east. The plaintiff and a few others approached the train nearly in front of the gallery. There was a loaded wagon on the track ahead of the train and the train was moving slowly. The evidence for defendant was that the train was running at about half speed on account of the obstruction ahead. The evidence for the plaintiff was that it was moving very slowly, and that plaintiff attempted to get on and caught hold of the upright bar at the rear end and put one foot on the running-board, and as he raised himself from the ground, fell and was dragged a short distance, breaking one leg and bruising the other. The gripman testified that the train was running at about half speed; that when he saw the boys running to the car he slackened speed still further for the purpose of avoiding an accident and to permit the boys to get on the car, and that just as he did so he got an emergency signal to stop and applied the rail brake and stopped the car. Two witnesses for the plaintiff who were on the grip-car testified that as the train approached the boys one of the witnesses spoke to the gripman to the effect that he had better be careful, and the gripman told him to go to hell and mind his own business. The grip-

man denied that the passenger said anything to him or that he made the reply which had been testified to, and a conductor of the defendant who was not employed on that train but who was riding on the grip-car testified that he did not hear anything of the kind; that nothing was said by the passenger to the gripman, and that nothing could have been said without his hearing it.

The principal controverted question of fact was whether the defendant was guilty of the negligence charged against it as a basis of the action, which was the alleged sudden and violent jerking of the car while plaintiff was attempting to board it. On that question the plaintiff, the two passengers already mentioned, three of plaintiff's companions who got on the train and three of the boys who did not become passengers, testified that as plaintiff was getting on the train the car gave a jerk, lurch or lunge forward, and one boy who testified for the plaintiff did not notice and could not tell whether the car went faster or not. On the part of the defendant, the gripman, the conductor before mentioned who was riding with him, the two conductors who were running the train, two passengers and two bystanders testified that there was no jerk, lurch or lunge and no increase in the speed of the train during the occurrence. Three bystanders testified that they observed the occurrence and accident and saw no forward jerk at the time. It will be seen, therefore, that the conclusion of the jury as to a vital question in the case depended upon the credibility of witnesses who contradicted each other as to the fact; and as to the gripman and conductor on one side and the two witnesses for the plaintiff on the other, there was a question of veracity concerning a matter about which neither could have been mistaken. None of the witnesses were impeached by any direct method prescribed by the law, such as an attack upon their reputation for truth and veracity, or otherwise.

The sixth instruction given at the instance of the plaintiff, which is complained of, is as follows:

"The court instructs the jury that the denunciation of witnesses by counsel, if any such was indulged in, should not influence the jury to disregard or disbelieve the testimony of any unimpeached witness. Witnesses, like all other citizens, are presumed by the law to be law-abiding citizens, and the law supplies a proper method of impeaching their evidence in cases where it can be impeached."

The instruction, in effect, advised the jury that there was a rule of law that they must not be influenced by the argument of counsel to disregard or disbelieve the testimony of any witness unless such witness had been impeached. The jury are to decide questions of fact, and the purpose of argument by counsel is to induce them to decide such questions in accordance with the claims and theories of counsel. Where witnesses contradict each other, the object of argument is to influence the jury to believe the testimony of one and to disregard or disbelieve the testimony of the other. To that end counsel have a right to present to the jury, in argument, the inconsistencies and contradictions of witnesses, to comment on their manner of testifying, their appearance upon the stand, the improbability of their statements, and anything else which will show that they are mistaken or unworthy of belief, and to denounce a witness as unreliable or untruthful when subjected to any of the tests for determining his credibility. It is the right of counsel to draw any and all proper inferences arising from the evidence in the case, tending to show that the testimony of witnesses is untrue. (*East St. Louis Connecting Railway Co. v. O'Hara*, 150 Ill. 580.) The instruction was erroneous in telling the jury that the credibility of a witness cannot be affected by the argument of counsel unless the witness is impeached, and in practically destroying the effect of argument on the credibility of witnesses or the weight to be given to their testimony.

But counsel for appellee say that the record does not show that there had been any argument, and for that reason

the instruction was not harmful. The case of *North Chicago Street Railroad Co. v. Wellner*, 206 Ill. 272, is cited to support that claim. In that case the instruction related to statements of counsel, not based upon the evidence, made either in putting in evidence in the case or in argument, and it would have had some relation to the case although there had been no argument. But in this case the first part of the instruction related to nothing else, and had neither place nor purpose in the case unless there had been argument to the jury. Counsel on each side asked, and the court gave, instructions relating to argument of counsel and which could apply to nothing else. But if we ought to or can presume that counsel on each side asked the court to give, and the court gave, purposeless and useless instructions concerning something which never happened, and that the only effect, so far as argument is concerned, was to misinform the jury as to the law applicable to a case where there is argument, the objections to the instruction are not thereby removed.

The part of the instruction which states that witnesses, like all other citizens, are presumed by the law to be law-abiding citizens and the law supplies a proper method of impeaching their evidence in cases where it can be impeached, is equally vicious with the other part. The question of the credibility of witnesses is exclusively within the province of the jury, and it is not the right of the court to take that question from them. Whether a witness has been impeached is a question of fact and not of law, and when not impeached it is for the jury to determine whether he shall be believed and to what extent. The court may give to the jury general rules for their guidance, but where witnesses contradict each other as to matters of fact and there is no impeachment of any witness, as was the case here, the law indulges no presumption that they are all telling the truth. When a witness testifies in a case, the inherent improbability of his statements may induce the jury to disbelieve him although he is not contradicted. How much weight is to be given to his

testimony depends largely upon his appearance, his manner of testifying, and all the other evidence and circumstances from which the jury may credit or discredit him. Where witnesses contradict each other and the result of the case depends upon their credibility, it is for the jury to determine which one they will believe. (*Stampofski v. Steffens*, 79 Ill. 303.) The law has no rule which the court may lay down in instructions to the jury that there is a presumption that an unimpeached witness has testified truly, and such instructions infringe upon the province of the jury to determine the credibility of the witnesses and the weight and value of their testimony. *Hauser v. People*, 210 Ill. 253; 30 Am. & Eng. Ency. of Law, (2d ed.) 1068; 11 Ency. of Pl. & Pr. 312.

The seventh instruction was based on the hypothesis that the plaintiff was a passenger, and it began with this statement: "The court instructs the jury that the fact that the law does not make a common carrier an insurer of the safety of its passengers does not, even to the slightest extent, relieve such common carrier of its legal duty to exercise the highest degree of care for the safety of its passengers consistent with the practical operation of its vehicle." The purpose of instructions is to state and explain the law applicable to the case, and the practice of injecting an argument in an instruction is not approved. (*Ludwig v. Sager*, 84 Ill. 99.) There was no question in the case to which this prefatory statement was in any way related, and while the statement of law was not incorrect it should have been omitted. The remainder of the instruction and the ninth instruction were on the same question of the duties of a common carrier of passengers for hire, and they are objected to on the grounds that the evidence did not tend to prove that the plaintiff was a passenger and that the declaration did not so aver. We are of the opinion that the instruction is not subject to either objection. Facts were stated in the declaration which, if proved, showed that he was a passenger. It

alleged that he was rightfully and with due care and diligence in the act of getting upon and alighting upon said car, which was then and there receiving and discharging passengers of the defendant, for the purpose of being carried as a passenger thereon for reward. The evidence was that the car was in motion and not at a stopping place for passengers, but there was evidence tending to show that the car was slowed down for the purpose of permitting plaintiff and his companions to take passage thereon. That evidence was contradicted, but the decision of the question was for the jury. The relation of passenger and carrier is contractual, and does not arise out of the fact that a person runs toward a moving car to get on board, but the relation may be proved by circumstances, and we do not regard it as error to give the instructions to the jury in this case.

For the error in giving the sixth instruction the judgments of the Appellate Court and circuit court are reversed and the cause is remanded to the circuit court.

Reversed and remanded.

FERDINAND HEIMANN *et al.*

v.

CATHERINA WILKE.

Opinion filed December 20, 1905—Rehearing denied Feb. 7, 1906.

RES JUDICATA—*when questions cannot be raised on second appeal.* Where the Supreme Court, on appeal, reverses a judgment sustaining a demurrer and holds that the facts alleged in the bill are sufficient to require the court to grant the relief prayed, if the facts so alleged are proved after the case is remanded the principles of law announced on the first appeal cannot be questioned on appeal from the decree granting such relief.

APPEAL from the Circuit Court of Cook county; the Hon. JOHN L. HEALY, Judge, presiding.

COLLINS & KENNEDY, for appellants.

J. HENRY KRAFT, for appellee.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

Frank Wilke filed his bill in this case in the circuit court of Cook county against appellants and others to compel a conveyance by appellants of two and one-half acres of land in said county. The court sustained a demurrer to the bill and dismissed it. The complainant brought the record to this court by appeal, and we decided that the facts alleged in the bill of complaint were sufficient to require the court to grant the relief therein prayed for and that the court erred in sustaining the demurrer. The decree was reversed and the cause remanded to the circuit court with directions to overrule the demurrer. The nature of the case and the averments of the bill are set out at length in the opinion then filed. (*Wilke v. Miller*, 171 Ill. 556.) The cause was reinstated in the circuit court, and the demurrer having been overruled the defendants answered the bill. The separate answer of appellants denied the averments upon which the prayer for relief was founded and also claimed the benefit of the Statute of Frauds. The issues were referred to a master in chancery, and his term having expired the reference was continued to him as a special commissioner. Frank Wilke died, and the appellee, Catherina Wilke, his sole devisee, was substituted as complainant. The special commissioner reported the evidence with his conclusions that the material averments of the bill were proved, and that the defendant Ferdinand Heimann, by the purchase of the five acres at the master's sale, acquired title to the two and one-half acres thereof which are in controversy, upon a constructive trust for complainant, and that appellants should be decreed to convey the same upon the payment of a proportionate share of the purchase price, with subsequent taxes

and interest. Exceptions to the commissioner's report were overruled and a decree was entered in accordance with the report. From that decree this appeal was prosecuted.

All questions of law in this case were settled on the former appeal, including the question whether the Statute of Frauds was available as a defense to the bill. The principles of law then announced cannot be questioned on this appeal. (*Taylor v. Frew*, 113 Ill. 358; *Keokuk Bridge Co. v. People*, 185 id. 276; *Pease v. Ditto*, 189 id. 456.) Upon the reference to the master the facts alleged were proved and were found and reported by him to the court, and the findings were approved by the court.

The decree is affirmed.

Decree affirmed.

THE WABASH RAILROAD COMPANY

v.

GEORGE W. CAMPBELL *et al.*

Opinion filed December 20, 1905—Rehearing denied Feb. 8, 1906.

1. CARRIERS—*when conduct of shipper's agent is not contributory negligence.* In an action for damages against a railroad resulting from a mistake of the company in shipping the plaintiff's cattle in cars bearing placards "Southern Cattle," which injured the sale of the cattle, the failure of plaintiff's agent to tear off the cards when he discovered them is not such contributory negligence as reduces the damages, since such act would have been subject to a penalty for interference with a government regulation concerning such placards.

2. SAME—*whether shipper's agent used proper efforts to reduce damages is a question of fact.* Whether the plaintiff's agent to whom cattle were shipped used proper efforts to reduce the damages arising from the fact that the cars in which the cattle arrived at their destination were erroneously placarded "Southern Cattle." is a question of fact not open to review in the Supreme Court in reviewing a judgment for damages affirmed by the Appellate Court.

3. SAME—*correct rule as to measure of damages for negligence in shipping cattle.* In an action to recover damages for the negli-

gence of the carrier in shipping cattle in cars erroneously placarded "Southern Cattle," the correct measure of damages is the difference between the market value of the cattle on arrival at their destination in the condition then existing with reference to the cars, and the market value of cattle of like kind and character at the time; and evidence as to what the cattle subsequently sold for is properly excluded.

4. CONTINUANCE—*when amendment of the declaration is not ground for continuance.* Amendment of a declaration in an action for damages to conform to the evidence in regard to depreciation in value, which had already been introduced without objection, is not ground for a continuance upon the ground of surprise.

5. EVIDENCE—*courts take judicial notice of government regulations.* In an action for damages for shipping the plaintiff's cattle in cars erroneously placarded "Southern Cattle," proof of the government regulations with regard to the quarantine district and the cars carrying cattle from such district is harmless, whether proper or not, since courts take judicial notice of such laws and all persons are presumed to know them.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Shelby county; the Hon. SAMUEL L. DWIGHT, Judge, presiding.

This is an action on the case, brought by the appellees, Campbell, Hunt & Adams, against the appellant railroad company. The original declaration, filed January 30, 1903, contained one count, alleging in substance that the defendant operated a railroad between East St. Louis and the city of Sullivan, in Illinois; that, on October 10, 1902, defendant received of plaintiffs at East St. Louis two hundred head of cattle in good condition to be safely carried to Sullivan for a reward; that, by reason thereof, it became bound to furnish and load the cattle in proper cars, free from disease or other infection, and carefully convey the same to said destination; that defendant did not regard this duty, but, through negligence of itself and its servants, the cars were marked, carded and billed "Southern Cattle," meaning thereby that the cattle shipped therein were infected or diseased cattle, by means

whereof said cattle became unsalable and could not be sold, and became greatly depreciated in value, and so remained, so that the plaintiffs were obliged to lay out and did lay out \$1300.00 endeavoring to make sale of said cattle, and incurred expenses in their necessary support and maintenance during four months, while prevented from selling them, amounting to \$1500.00.

A trial was had, resulting in a verdict for plaintiffs for \$760.50. A motion for new trial was made by defendant and overruled, and a motion in arrest of judgment was filed, pending which plaintiffs asked and obtained leave to amend their declaration. Under this leave two additional counts were filed.

The new matter charged in the counts was that the cards, containing the words "Southern Cattle" were in general and exclusive use for the purpose of giving notice that the cars, on which they were fastened, were infected cars and were liable to spread disease, or that the cattle in them were infected or southern cattle, "and as such liable to communicate the disease, generally called 'Texas fever,' to all cattle, with which they might come in contact, of which defendant then and there had knowledge," and said cars were thus rendered unsuitable for the transportation of said cattle, of which defendant had due knowledge.

Appellant by its attorney made and filed a motion to have the verdict set aside and the cause continued, supported by affidavit showing that, in consequence of the new issues introduced into the case by the additional counts, appellant was surprised and unprepared to meet or try the same at that term of court, and stated the facts expected to be proved which would negative the new charges, and that, if the case was continued, the appellant would be able to procure such evidence at the next term of court. The motion was denied, and exception was duly preserved to the court's action. Thereupon, the motion in arrest of judgment was also denied, and exception was duly taken. Judgment was then

entered against the defendant company for \$760.50, damages and costs. An appeal was taken from this judgment to the Appellate Court, where the judgment has been affirmed. The present appeal is from such judgment of affirmance, the Appellate Court having granted a certificate of importance. The material facts of the case, as stated by the Appellate Court in their opinion, are as follows:

"On October 27, 1902, the appellees shipped from East St. Louis, over appellant's road, one hundred and twenty head of cattle, contained in four cars, and consigned to one J. C. Bean, appellees' agent at Sullivan, Illinois, to be by him there sold. At the time of such shipment there were in force certain rules and regulations, promulgated by the Department of Agriculture of the United States, for the purpose of regulating and controlling the shipment from within the limits of a certain quarantine district, thereby established, of cattle originating within such district. Such cattle were commonly known as and called 'southern cattle,' and were generally infested with what are called 'cattle tick,' by reason of which native cattle, coming in contact with them, were liable to contract splenetic or Texas fever. It was provided by said regulations that no cattle should be transported from the quarantine district therein established, and otherwise known as the 'scheduled district,' except upon condition that they should be placed in pens or yards set apart for infected cattle, to which no other cattle should be admitted; that all cars, used for the transportation of the same, should be cleansed and disinfected as soon as possible after unloading, and before they were again used to transport animals; that all cars, carrying cattle from the 'scheduled district,' should bear on both sides thereof, printed placards, to be affixed by the carrier, stating that they contained southern cattle, and further that each of the way-bills, accompanying the shipments, should have plainly written or stamped upon its face a similar statement. Through the negligence of the servants of appellant, cards of this description were attached

to the cars containing appellees' cattle, although the same were not southern cattle and did not come from the scheduled district. The evidence tends to show that, upon the arrival of the cattle at Sullivan, the presence of the cards prevented their sale at the market price, by creating a suspicion or impression among possible purchasers, that they had been shipped from the scheduled district, and for that reason were likely to have and communicate to other cattle the splenetic or Texas fever."

C. N. TRAVOUS, for appellant.

R. M. PEADRO, for appellees.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

The cattle of appellees were shipped over appellant's road from East St. Louis to Sullivan in cars, upon which were tacked yellow cards, ten by twelve inches in size, bearing the words "Southern Cattle." The cars containing the cattle were four in number. One of these cars arrived at Sullivan on Friday or Saturday, and contained about twenty-five head of cattle. The other three cars, containing some ninety or ninety-five head of cattle, arrived at Sullivan on Monday. It is conceded by the appellant that the cattle were by mistake put in the cars, having on them labels containing the words "Southern Cattle." The cattle shipped were not southern cattle, and did not come from the scheduled district. The cars, in which the cattle were transported, were not defective in any respect, nor infected with any disease. When, however, the cattle arrived at Sullivan, the presence on the cars of the yellow cards, containing the words "Southern Cattle," prevented purchasers, present in the yards when the cattle arrived, from purchasing any of them. The agent of appellees was unable to sell them at the market price, because the labels upon the cars created a suspicion, that the

cattle had been shipped from the "scheduled district," and were probably infected with what was known as the "Texas fever." The evidence is quite clear, that the mistake or negligence of the defendant company in shipping the cattle in cars, labeled as aforesaid, prevented their sale.

First—The first point, made by appellant, is that appellees were guilty of contributory negligence, upon the alleged ground that their agents did not remove the cards from the cars, and because, after the cars arrived at Sullivan, they did not make reasonable efforts to dispel the suspicions, or erroneous impressions, as to the condition or character of the cattle, which the cards in question gave rise to.

While the cattle were in transit and before Sullivan was reached, the conductor of the freight train called the attention of one Perry, an agent of the appellees who accompanied the cattle, to the fact, that the cards in question were upon the cars and that the cattle thereby transported were designated as diseased or infected cattle. Upon the arrival of the train at the next station, Perry, who denied that the cattle were southern cattle, dismounted from the train, and, for the first time, as it appears, saw that the cards were upon the cars. It is insisted by the appellant that it was Perry's duty to have torn the cards off the cars, as he knew that the cattle were not southern cattle, and the cars were not infected. The failure of Perry thus to tear the cards from the cars is said by the appellant to be contributory negligence on the part of the appellees.

In support of the contention, that the appellees were thus guilty of contributory negligence, the doctrine is invoked that, where a party is injured by a breach of contract or tort, it is his duty to make reasonable effort to avoid damages therefrom; and that such damages, as may by reasonable diligence on his part be avoided, are not to be regarded as the natural and probable result of the defendant's acts. In other words, there can be no recovery for damages, which might have been prevented by reasonable efforts on the part

of the person injured. (*Hartford Deposit Co. v. Calkins*, 186 Ill. 104; *Simpson v. Keokuk*, 34 Iowa, 568; *Chicago and Alton Railway Co. v. Buck*, 14 Ill. App. 394). The doctrine is thus stated in *Simpson v. Keokuk*, *supra*: "If the plaintiffs, by the use of ordinary diligence and efforts, and at a moderate expense, might have prevented the damage, it seems necessarily to follow that their negligence contributed to the injury; and this, upon a well-settled rule, would defeat the plaintiff's recovery."

We are of the opinion that the failure of Perry, the agent of appellees accompanying the cattle, to tear the cards in question from the cars, did not operate to charge appellees with contributory negligence. The tacking of these cards, with the words "Southern Cattle" upon them, upon the cars, was a government regulation. The government required them to be placed upon the cars under regulations, adopted for the purpose of controlling shipments from within the limits of a certain quarantine district. If Perry had attempted to remove these cards, he would have been subject to a penalty for interfering with a government regulation. It was not, therefore, his duty to remove the cards in the manner insisted upon by the appellant.

It is also said that, when the cars arrived at Sullivan, Bean, the agent of the appellees at that point, to whom the cattle had been shipped, did not use proper efforts to remove from the minds of parties, who were at the yards for the purpose of purchasing cattle, the impression, created by the existence of the labels upon the cars. In other words, it is said that Bean, knowing that the cattle were not southern or diseased cattle, and had not come from the quarantine district, and that the cars were not infected, should have proceeded to inform the possible purchasers of those facts. It does appear that Bean telegraphed to the agent of appellees at East St. Louis the fact of the existence of the cards upon the cars, and their effect upon purchasers, and that an agent of appellees at East St. Louis called upon the agent

of the defendant company at East St. Louis in regard to the matter, but the latter refused to pay any damages. Whether or not proper efforts were made at Sullivan by the agent or agents there of the appellees to remove the impressions, created against the character of the cattle, was a question of fact that was presented to the jury by the instructions of the court, and has been decided against appellant by the judgments of the lower courts.

The proof showed that one of the representatives of the appellant told one of the agents of the appellees, that appellees should have taken the cards off the cars when he discovered that they were there. But no point was made upon the trial below, by objection to the evidence, that appellees or their agents were guilty of any contributory negligence in failing to tear the cards from the cars, or otherwise to remove the unfavorable impression, created by the presence of the cards upon the cars. For the reasons above stated, we are of the opinion that the objection thus made is not well taken.

Second—It is next insisted by appellant that the court below did not adopt or announce to the jury a proper rule in regard to the amount of damages to be recovered by the plaintiffs on account of the injury suffered. It is said by the appellant that the appellees were only entitled to recover as damages the cost of preventing or removing the injurious effect of the cards, and of the support and maintenance of the cattle, pending necessary delay, if any, in their sale on account of the presence of these cards upon the cars. For this reason it is said that the court erred in giving for the appellees the fourth instruction, which was given for them, and which made the following announcement: "The measure of damages in this case, if you find there has been any damage, is the difference, if any, which has been shown by the evidence, between the market value of the cattle on arrival at Sullivan, Illinois, in the condition then existing with reference to the cars, and what the market value of such

cattle of like kind and character was at said time, as shown by the evidence."

The cause was tried by both parties upon the theory announced in the fourth instruction. The proof tended to show that the market value of the cattle at the time they arrived in Sullivan was \$4.25 to \$4.50 per hundred pounds. The testimony also showed that, by reason of the unfavorable impression created in regard to the cattle by the presence of the cards upon the cars, their market value was reduced some \$8.00 or \$10.00 per head. Some of the testimony was to the effect that their value was reduced about \$2.50 per hundred. Other testimony was to the effect that their value was reduced \$1.00 per hundred. There is no question but that the amount of the verdict \$760.50 was considerably less than the amount of the damages, as fixed by the weight of the testimony. Indeed, the appellant makes no objection, as we understand its contention, as to the amount of the damages, but only as to the rule adopted in ascertaining the damages. Appellant introduced witnesses, of whom it made inquiry as to market value of cattle in Sullivan at that time.

The rule, adopted by the court in regard to the measure of damages, is the same which was announced by this court in the recent case of *Cleveland, Cincinnati, Chicago and St. Louis Railway Co. v. Patton*, 203 Ill. 376. In the latter case it was held that the measure of damages, in an action for injuries to horses in shipment, is the difference between what the horses were worth when received for shipment, and what they were worth when they reached their destination; and it was also there held that, where plaintiff, in an action for injuries to horses in shipment, was obliged to keep the horses for a month after their arrival at their destination on account of their damaged condition, evidence as to what they sold for after he prepared them for market was immaterial, and its admission was properly refused. Appellant here complains that it was not allowed to ask questions of the witnesses of appellees for the purpose of showing

what the cattle were subsequently sold for, but under the ruling in the *Patton case, supra*, such testimony was properly excluded.

Third—After the motion for new trial had been denied, the appellees asked leave to amend their declaration. Such leave was granted, and they filed two additional counts. The original count had charged that damages had been incurred by reason of the fact, that appellees were obliged to and did lay out money in endeavoring to make a sale of the cattle, and incurred expenses in their necessary support and maintenance for the time, during which they were prevented from selling them. In the additional counts it was charged that damages were suffered by reason of the depreciation caused in the market value of the cattle because of the cards placed upon the cars, as above stated. Appellant made a motion for continuance, when appellees were allowed thus to amend their said declaration, upon the alleged ground that it was surprised. The refusal of the court below to grant the continuance is here urged as a ground for reversal. It is apparent, however, that the matters, stated in the additional counts, did not constitute a new cause of action, but merely enlarged the averments of the original declaration as to the uses and purposes, to which the cards in question were generally devoted. In other words, no new issues were presented by the additional counts. The allegations of the additional counts merely conformed to the evidence in regard to depreciation in value, which had already been introduced by both parties, so that the amendment allowed did not require the introduction of any new evidence. Moreover, the appellant in the trial court did not make the objection that there was a variance. No question of variance was raised during the trial. It was not claimed that the testimony in regard to damages, suffered by depreciation in the market value of the cattle, was improperly introduced under the allegations of the original declaration, consisting of one count.

Fourth—Some other objections are made in regard to the giving and refusal of instructions and the admission and exclusion of evidence, but they are disposed of by the considerations already presented. For instance, complaint is made that the trial court refused to give the seventh instruction asked by the appellant, but that instruction announced to the jury that the failure of Perry to remove the cards from the cars constituted negligence. The instruction was properly refused for the reason already stated. Complaint is also made that the trial court refused the tenth instruction, asked by the defendant upon the trial below, but that instruction assumed that reports were circulated by the appellees' agents and also by the appellant's agents, which were detrimental to the character of the cattle. There was no evidence, upon which any statement to the jury in regard to such reports, was properly based. The act of the appellant, which was shown to have interfered with the sale of the cattle, was the putting of the cards upon the cars, and not the circulation of any report. Accordingly, the instruction was properly refused.

It is also objected that the court allowed some of the witnesses to testify as to the government requirements in regard to the quarantine district, and as to the regulations in regard to the cars, which carried cattle, coming from such district. Whether this evidence was proper or not, it could have done no harm, as courts take judicial notice of such laws, and all persons are presumed to know them. They are especially familiar to farmers and men dealing in cattle and other stock.

We see no reason for reversing the judgments of the lower courts. Accordingly, the judgment of the Appellate Court, affirming the judgment of the circuit court, is affirmed.

Judgment affirmed.

THE WASHINGTON PARK CLUB *et al.*

v.

THE CITY OF CHICAGO.

Opinion filed December 20, 1905—Rehearing denied Feb. 8, 1906.

1. SPECIAL ASSESSMENTS—*final hearing includes pronouncing of judgment.* Under section 41 of the Local Improvement act, requiring an affidavit to be filed before "final hearing," it is proper to allow a new affidavit to be filed after the evidence has been introduced and the arguments made and the court has taken the case under advisement but has not pronounced judgment.

2. SAME—*affidavit which shows compliance with section 41 is sufficient.* The affidavit required by section 41 of the Improvement act to be filed before final hearing, showing compliance with that section, need not show compliance with sections 38 and 39.

3. SAME—*what is not a material variance between a resolution and an ordinance.* There is not a material variance between the description of an improvement in the resolution as a system of "brick and vitrified tile-pipe sewer" and the description in the ordinance as a "system of brick and vitrified tile-pipe sewers," where the streets and sewers are each described in both the resolution and the ordinance.

4. SAME—*provision for house-slants every twenty-five feet is not unwarranted.* A provision in a sewer ordinance for house-slants every twenty-five feet is not unwarranted, as being unreasonable and an arbitrary subdivision of the abutting property.

5. SAME—*certified report cannot be impeached by party who made it.* Where the superintendent of special assessments certifies in his report that he has investigated the district covered by the proposed system of sewers, as required by section 39 of the Improvement act, property owners cannot impeach such report by calling him as a witness to testify that he has not investigated the district.

APPEAL from the County Court of Cook county; the Hon. ORRIN N. CARTER, Judge, presiding.

MACCHESNEY & BRADLEY, and F. W. BECKER, for appellants.

ROBERT REDFIELD, and FRANK JOHNSTON, Jr., (JAMES H. LEWIS, Corporation Counsel, of counsel,) for appellee.

Mr. JUSTICE HAND delivered the opinion of the court:

This was an application for the confirmation of a special assessment for the construction of a system of sewers in the city of Chicago. The appellants appeared and filed objections to confirmation. Their objections were overruled and the assessment confirmed, and the objectors have prosecuted an appeal to this court.

The appellants urge four objections as grounds for reversal in this court:

First—It is urged that the provision of section 41 of the Local Improvement act (Hurd's Stat. 1903, chap. 24, par. 547, p. 400,) that an affidavit shall be filed before the final hearing showing a compliance with said section 41, was not complied with. The point was made upon the argument of the case that the affidavit filed was not a compliance with section 41 of the Local Improvement act. Afterwards and before the case was finally decided, but after the evidence had been introduced, arguments heard and the court had held the matter under advisement for some weeks, an amended affidavit was permitted to be filed on behalf of the city. This affidavit, we think, complies with all the requirements of that section of the statute, and was sufficient.

It is also said section 41 should be so construed as to require the affidavit mentioned in that section to show a compliance with the provisions of sections 38 and 39 of the Local Improvement act. Section 41 limits the affidavit to that section. Its language is, "showing a compliance with the requirements of this section." The statute does not require the affidavit to show a compliance with the requirements of sections 38 and 39 of said act, and the court did not err in overruling the objection.

Second—It is next urged there was a variance between the first resolution of the board of local improvements and

the ordinance in the description of the improvement. The resolution described the improvement as "a system of brick and vitrified tile-pipe sewer," while the ordinance described it as "a system of brick and vitrified tile-pipe sewers." The streets and character of the sewer in each street are described in the resolution as well as the ordinance, and the omission of the letter "s" in the word "sewers," in the resolution, could not have misled the property owners. The variance was immaterial and the objection was properly overruled.

Third—The ordinance provided for house-slants every twenty-five feet, and it is urged such provision is unreasonable and an arbitrary subdivision of appellants' lands. It has been repeatedly held that such provision in an ordinance is not unreasonable or an arbitrary subdivision of the property owner's land. *Vandersyde v. People*, 195 Ill. 200; *City of Chicago v. Corcoran*, 196 id. 146; *Duane v. City of Chicago*, 198 id. 471; *Walker v. City of Chicago*, 202 id. 531.

Fourth—The appellants called John A. May, the superintendent of special assessments, and sought to show by him that he had not investigated the district in which it was proposed to locate said system of sewers, in accordance with the provisions of section 39 of the Local Improvement act. In the report filed by the superintendent of assessments he certified he had made such investigation, and the appellants could not impeach his report by showing by him he had not discharged his duty in that particular. *Wright v. City of Chicago*, 48 Ill. 285; *Quick v. Village of River Forest*, 130 id. 323.

Finding no reversible error in this record, the judgment of the county court is affirmed.

Judgment affirmed.

EUGENE QUARTIER

v.

PETER DOWIAT.

Opinion filed December 20, 1905—Rehearing denied Feb. 8, 1906.

1. PLEADING—*nature of petition is determined from its allegations, form and the relief prayed.* If the allegations of a petition clearly show that it is a petition to contest an election, the facts that it is endorsed "Bill in chancery; petition to contest election," and that a portion of the prayer is for "such other relief as equity, justice and the good conscience of this court will grant," do not determine the character of the petition as a bill in chancery.

2. SAME—*when failure to enter a formal order overruling demurrer is not fatal.* Where a special demurrer is filed to a petition to contest an election on the ground that the petition is a bill in chancery and that courts of chancery have no jurisdiction in such cases, and is considered together with a motion to transfer the case to the common law docket, which is allowed, and a plea in abatement is filed after the case is transferred, failure to enter a formal order overruling the demurer is not fatal.

3. ELECTIONS—*rules of chancery apply to an election contest though the proceeding is purely statutory.* A proceeding to contest an election is purely statutory and is not regarded as a cause at law or in equity, and it is not error for the court to transfer the proceeding from the chancery to the common law docket; but as the rules of chancery practice apply, a plea in abatement is not proper, even though the cause is on the common law docket.

4. WAIVER—*when objection to sufficiency of service is waived.* By appearing generally and demurring to a petition to contest an election the defendant waives any ground of objection to the sufficiency of the service, and also the right to afterwards enter a special appearance and object to the jurisdiction of the court over his person.

APPEAL from the Circuit Court of Vermilion county; the Hon. JAMES W. CRAIG, Judge, presiding.

BUCKINGHAM & DYSERT, and A. A. PARTLOW, for appellant.

PENWELL & LINDLEY, for appellee.

Mr. JUSTICE BOGGS delivered the opinion of the court :

This was a proceeding instituted by the appellee in the circuit court of Vermilion county to contest the election of the appellant to the office of president of the board of trustees of the village of Westville. A petition was filed with the clerk of the said circuit court, which, after alleging many grounds why the appellant should be declared not duly elected and why the appellee should be declared elected, contained the following prayer: "Your petitioner further represents that on a count of the ballots cast by the electors your petitioner would have a clear majority, and he asks that such relief be granted as is provided by the statute in such cases made and provided, and for such other relief as equity, justice and the good conscience of this court will grant." The petition concluded as follows: "Your petitioner further asks that upon a re-count of said ballots as provided by law he be declared duly elected president of the village of Westville, and the declaration of the said judges that the said Eugene Quartier has been elected be annulled and canceled." A regular form of chancery summons was issued, which ordered the appellant "to answer unto Peter Dowiat in his certain bill of complaint, being a petition to contest election, filed in said court on the chancery side thereof," and was served as a chancery summons. The appellant appeared and interposed a special demurrer, on the ground that the contest of an election was a statutory proceeding and that a court of chancery had no jurisdiction to hear and determine an election contest. Thereupon appellee "moved the court to direct the clerk thereof to place the cause upon the common law docket of this court at the present term thereof." The demurrer and the motion, called in the record a "cross-motion," were argued by the respective counsel together, and the court granted the motion as a cross-motion but made no formal order as to the disposition of the demurrer, and the cause was thereupon placed upon the common law docket. When the cause had been duly entered on

the common law docket the appellant presented a plea in abatement, in which he recited all of the proceedings in the cause up to that time, and urged that the court had no jurisdiction of his person for the reason that he had not been served with process, as required in common law actions. A general demurrer was sustained to this plea, and the appellant electing to stand by his plea, the court heard the cause on the merits and entered judgment in accordance with the prayer of the petition. This appeal is from such judgment.

Appellant urges that the court erred in not ruling upon and sustaining his demurrer to the petition. His contention is, that the petition filed herein was a bill in chancery; that he had been served with chancery process and that a court of chancery had no jurisdiction to hear and determine the cause, being the contest of an election. This contention is based upon that portion of the prayer of the petition "for such other relief as equity, justice and the good conscience of this court will grant," and the fact that the endorsement on the petition read, "Bill in chancery; petition to contest election," and that the form of the summons was that of chancery process. This petition was addressed to the judge of the circuit court generally,—not "in chancery sitting,"—and contained none of the ear-marks of a bill in chancery with the one exception above noted. The clause in the prayer of the petition is mere surplusage and can in no way be considered as changing the nature of the petition. The endorsement on the petition, "Bill in chancery," did not determine the nature and character of the petition, but the allegations of the petition, the form thereof and the relief asked therein would control. The allegations and the concluding paragraph of the petition clearly disclose that it was a petition under the statute to contest an election,—not a bill in chancery. The demurrer was not, therefore, well taken.

Technically, an order overruling the demurrer should have been entered, but the granting of the motion as a cross-motion, (that and the demurrer having been argued to-

gether by counsel,) clearly showed that the court acted upon the demurrer and the motion together, and regarded the decision on the motion as in effect and for all purposes as the overruling of the demurrer in the same manner, as the allowance of a cross-motion renders judgment on the motion unnecessary. In this peculiar situation, the additional fact that the appellant pleaded to the petition when placed on the common law docket being also kept in mind, the failure to enter a formal order showing the disposition of the demurrer ought not to be regarded as a fatal error.

The court did not err in transferring the cause from the chancery to the common law docket. This is a purely statutory proceeding and is not regarded as a cause at law or in equity. (*Douglas v. Hutchinson*, 183 Ill. 323.) In *Reed v. Boyd*, 84 Ill. 66, which was a suit to establish a mechanic's lien under a statutory proceeding, the statute requiring such suit to be entered upon the common law docket, we said (p. 71): "Nor can the fact that the statute requires it to be placed on the common law docket change the nature of a cause. It is immaterial whether it is on one docket or another. Its position on the docket cannot change its nature or its inherent qualities."

The demurrer to the plea in abatement was properly sustained. Proceedings of this character are in the nature of chancery suits and the rules of chancery practice apply. (*Weinberg v. Noonan*, 193 Ill. 165; Rev. Stat. chap. 46, sec. 116, entitled "Elections.") Section 119 of the Election act provides the final order in a contested election case shall be a judgment declaring who is elected,—not a decree in which recitals of fact could be incorporated. In case of appeal or writ of error to reverse the same, the burden of preserving the evidence to sustain an attack on the judgment devolves on the party who questions the correctness of the action of the court.

The summons recited that the cause was on the chancery side of the court. This statement was not inaccurate, as a

proceeding of this character is governed by the chancery practice. (*Reed v. Boyd, supra.*) Furthermore, the appellant, by entering his appearance generally and demurring to the petition, waived any ground of objection he might have had to the sufficiency of the service, and by the same action waived the right to afterwards enter a special appearance to object to the jurisdiction of the court over his person.

The record is free from error reversible in character. The order and judgment appealed from is affirmed.

Judgment affirmed.

JOSEPH BRIGGS

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Opinion filed December 20, 1905—Rehearing denied Feb. 13, 1906.

1. CRIMINAL LAW—*record must be free from substantial error to sustain conviction.* Where there is a conflict of the evidence as to the guilt of the accused the record must be free from substantial error in order to sustain the verdict, particularly one imposing the death penalty.

2. SAME—*right of counsel, on cross-examination, to assume previous answer is untrue.* It is proper, on cross-examination, for counsel to assume that some previous answer of the witness is untrue, either from willfulness or want of recollection, and he may put his questions in various forms to show that fact; and it is error for the court to deny that right where the cross-examination is not pursued to an unwarrantable extent.

3. SAME—*when remark of court is prejudicial.* A remark by the court giving the jury the impression that the witness whom counsel for the accused was cross-examining had emphatically denied making the statement counsel for the accused is seeking to show she did make is prejudicial error, where the record shows that the witness had merely testified that she did not think she made the statement.

4. SAME—*when question is leading and improper.* After a witness for the People has identified the accused as the person who fired the shots, it is improper to allow counsel for the People to induce the witness to emphasize his former statement by asking the

leading question, "Are you positive that he is the man that shot" the deceased?

5. SAME—*right of accused to give his version of transaction after the arrest.* Where the police officers who arrested the accused are allowed to testify as to what was said by him after he was arrested, it is error to refuse to permit the accused to give his version of the conversation.

6. SAME—*right of accused to base cross-examination on statements of witness at coroner's inquest.* Where a witness has positively identified the accused on the trial, counsel for the accused have the right to cross-examine the witness as to whether he had not stated at the coroner's inquest that he was not positive of such identification, and are not restricted to proof of the coroner's minutes containing the signed statement of the witness.

7. SAME—*court should not express opinion on the facts.* It is not the province of the court, in a criminal case, to express in the jury's hearing any opinion upon the facts, either orally during the trial or in the form of instructions.

8. SAME—*what remarks by court are reversible error.* Where, on motion of counsel for accused (who relied on an *alibi*) to strike out a statement by a witness that he found the back door of the store where deceased was shot, open, the court says, "The evidence here is that the defendant walked that way," and afterwards, upon counsel's suggestion that "*some* defendant did," the court says, "No, this defendant; two witnesses have testified; the colored man testified that he went out that way," such remarks are reversible error.

9. SAME—*when instruction as to proof of alibi is misleading.* An instruction stating that "in this case what is known as an *alibi*,"—that is, that the defendant was at another place at the time it is claimed the offense was committed,—is, in part, relied on by the defendant, to render the evidence of an *alibi* satisfactory it must cover the whole time of the transaction in question, so as to render it *impossible* that the defendant could have committed the act," is misleading.

WRIT OF ERROR to Criminal Court of Cook county; the Hon. ALBERT C. BARNES, Judge, presiding.

EDWARD MAHER, special counsel and as *amicus curiæ*, for plaintiff in error:

This court will not hesitate to reverse a judgment of conviction in a criminal case where the evidence on which it is based is of an unsatisfactory character, and where the evi-

dence in the case so greatly preponderates in favor of the defendant that after a patient consideration thereof there remains such grave and serious doubt of the guilt of the accused as leads to the conclusion that the verdict of the jury is the result of prejudice and passion, and not of that calm and deliberate consideration of the evidence which the law requires. *Keller v. People*, 204 Ill. 604; *Cunningham v. People*, 210 id. 414.

If the verdict is palpably against the weight of the evidence it will be set aside. *Lathrop v. People*, 197 Ill. 177.

The necessity for enforcing the rule that no evidence can be admissible which does not tend to prove or disprove the issue is much stronger in criminal than in civil cases. *Dyson v. State*, 26 Miss. 362; *Hudson v. State*, 43 Tenn. 355.

Evidence that does not tend to prove the issue, to the exclusion of collateral circumstances not capable of generating a reasonable presumption or inference respecting the principal matter in dispute, is inadmissible. *Rye v. State*, 8 Tex. App. 153.

A witness called by the opposing party can be discredited by proving that on a former occasion he made a statement inconsistent with his statement on trial, provided such statement be material to the issue. Wharton on Crim. Evidence, (9th ed.) sec. 481.

A trial court should not make any remark to or in the presence of the jury concerning matters of fact which might possibly in any degree influence their verdict. *State v. Hurst*, 11 W. Va. 54.

The trial court should say nothing, either remark or inquiry, which would appear to be an expression of opinion on the facts. *Cooper v. State*, 10 Tex. App. 473.

The remark of the court, "I am not satisfied with this; let the defendant take the stand," is reversible error. *Lycan v. People*, 107 Ill. 423.

The court should not express any opinion on the facts. He should state the law only. *Weyrich v. People*, 89 Ill. 90.

WILLIAM H. STEAD, Attorney General, and JOHN J. HEALY, State's Attorney, (ROBERT N. HOLT, of counsel,) for the People:

A reversal will not be granted on account of the insufficiency of the evidence unless it is so insufficient as to clearly satisfy the court of the innocence of the accused. The mere fact that the court may have some doubt of the sufficiency of the evidence or the correctness of the verdict is not ground for reversal, but the court must be clearly satisfied that the verdict, under the evidence, is wrong or it must stand. *Cronk v. People*, 131 Ill. 56; *Aholtz v. People*, 121 id. 560; *Graham v. People*, 115 id. 566.

Where the evidence is conflicting it is the peculiar province of the jury to determine the truth of the matter in controversy and pass upon the credibility of the witnesses. In so doing they have the right to determine, if the circumstances warrant it, that the witnesses testifying in support of the defendant's theory have testified falsely, and wholly disregard their testimony if there is sufficient testimony supporting the theory of the prosecution upon which to base a conviction. *Gainey v. People*, 97 Ill. 270; *Henry v. People*, 198 id. 181.

The court may express his views of the law in ruling upon objections. *Territory v. Cordova*, 68 Pac. Rep. 919.

The court may correct counsel when he assumes a condition of fact not shown by the evidence. *United States v. Heath*, 20 D. C. 272.

Statements made to an attorney in the course of an argument are not addressed to the jury, and the jury should not consider them. *People v. Mooney*, 132 Cal. 13.

The burden of proof of an *alibi* in a criminal case is upon the accused, and in order to maintain the defense he is bound to show in its support such facts and circumstances as are sufficient, when considered in connection with all other facts in the case, to create in the minds of the jury a reasonable doubt of the charge against him. The reasonable doubt which will acquit a prisoner when his defense is an *alibi*, is a

doubt of guilt which arises from a consideration by the jury of all the evidence, as well that touching the question of the *alibi* as the incriminating evidence introduced by the prosecution. *Carlton v. People*, 150 Ill. 182; *Creed v. People*, 81 id. 565; *Ackerson v. People*, 124 id. 570.

A new trial is rarely allowed for the purpose of affording an opportunity to offer impeaching evidence. *Cochran v. Ammon*, 16 Ill. 315; *O'Reilly v. Fitzgerald*, 40 id. 313; *Fletcher v. People*, 117 id. 184; *Tobin v. People*, 101 id. 121; *Lathrop v. People*, 197 id. 169.

Mr. JUSTICE WILKIN delivered the opinion of the court:

Plaintiff in error, together with John Leonard and John F. Smith, was indicted by the grand jury of Cook county on September 29, 1904, for the murder of Hans Peterson on the 12th day of that month. Plaintiff in error was tried at the February term of the criminal court of said county, and a verdict returned finding him guilty and fixing his punishment at death. So far as appears from this record the other defendants have not been tried. Motions for a new trial and in arrest of judgment were interposed by counsel for the defendant, Briggs, which were overruled and he was sentenced to be executed on June 16, 1905, his counsel being allowed until that date to prepare and file a bill of exceptions. Subsequently the date of execution was postponed to June 23 for want of the presentation of a bill of exceptions, the court reciting, in different orders extending the time, that the interest of the defendant had been so seriously neglected by his counsel that sufficient time did not remain to prepare and file a bill of exceptions before the date of execution fixed, which condition of affairs was without the knowledge or procurement of the defendant himself. On the 15th day of that month Edward Maher, of the Chicago bar, was by order of the court, of its own motion, appointed additional counsel for the defendant, the order stating that the court deems it to be in the interest of the defendant that he have

additional counsel for the purpose of presenting his case to the Supreme Court. A bill of exceptions was thereafter prepared by the said Maher, as "special counsel and *amicus curiæ*," and duly signed by the trial judge. The bill of exceptions shows that one ground of the motion for a new trial was newly discovered evidence. The complete record was filed in this court, and upon consideration of the errors assigned thereon it was ordered that the writ of error be issued and made a *supersedeas*. At the present October term the case was finally submitted for decision.

Hans Peterson was on the 12th day of July, 1904, about seven o'clock in the evening, shot in his place of business on the north-west corner of Lake and Robey streets, in the city of Chicago, causing his death a few hours later. The motive for the killing, apparently, was robbery. Immediately after the shooting of Peterson a colored man employed in the store, named William Portee, was shot by the same person who fired the fatal shot at the deceased. The guilt of the defendant, Briggs, depends wholly upon his identification as the man who did the shooting. There were present in the store at the time of the shooting, beside the deceased, a Mr. Carlton, a son of Peterson, a clerk named Knowles, a boy about twelve years of age named Albert Piemental, and the colored man, Portee. Of these persons the boy Piemental and Portee testified that the defendant, Joseph Briggs, was the person who did the shooting. None of the other parties present at the time were examined as witnesses. The defendant claimed that at the time of the commission of the crime he was at another and different place and had nothing whatever to do with the killing of Peterson or the shooting of Portee. He lived at the time on Robey street, about one-half mile south of the place of the murder, with his family, a wife and two children, and was employed by the Chicago, Milwaukee and St. Paul Railway Company. He had previously been convicted of the crime of burglary and sentenced to the penitentiary, but after serving a time

was paroled. A good deal is said in the argument by his counsel as to his good resolutions of reformation, and on the other hand counsel for the People say that he had been charged with other crimes after being paroled. His character was not put in issue. There is no evidence in this record to support the assertion that he was charged with other crimes, nor is it legally shown that he was endeavoring to make amends for his past life; but neither of these contentions could, if true, properly enter into the decision of the case, and they are therefore wholly disregarded.

It is earnestly contended that the verdict of the jury was against the weight of the evidence, which failed to prove the defendant's guilt beyond a reasonable doubt. It will not be necessary at this time to discuss the evidence at length nor to determine the question thus raised. There is a conflict in the evidence as to the guilt of the defendant, and therefore, in order to sustain the verdict, it must appear that the record is free from material and substantial errors. Especially is this true where the verdict imposes the death penalty.

It is further urged that prejudicial error was committed in the rulings of the court on the admission and rejection of evidence. As a part of the People's case, one Matilda Peterson (not related to the deceased) testified that on the morning of the day previous to the killing, which was Sunday, she saw a young man come into the store of the deceased, whom she identified as the defendant, and that the deceased changed a \$10 bill for him. Her testimony was objected to as immaterial and irrelevant, but the objection was overruled. On her cross-examination, among other things, she said: "I remember going to the police station. I saw a lot of people in the room, and this man was there. I do not remember that I said to the desk sergeant, 'Which one is Briggs?' and I don't remember that they all laughed. I don't remember anything of the kind. I remember seeing him on the day before. I forget the date." Referring to

her testimony at the coroner's inquest, counsel for the defendant put the following question:

Q. "And were you asked this question and did you make the following answer: 'Where were you on the evening of September 12? A. In the evening? Q. Yes, at about seven o'clock. A. Do you mean Sunday or Monday morning?' Were those questions asked and did you make that answer?"

The court: "You needn't answer. The court will not allow a lot of questions that are not impeaching in character merely for the purpose of leading up to something."

In the course of her cross-examination, speaking of a policeman whom she met at the police station, she said: "I guess I met him outside when I came in."

Q. "Was he the one you asked that question, 'Which one was Briggs?'"

A. "I do not know."

Q. "Would you know that man?"

The court, without any objection being made on behalf of the People, interrupted the examination as follows:

The court: "The witness stated that she never made that statement."

Counsel for the defendant: "I think that is unfair."

The court: "After counsel has gone over the matter once and the witness has stated that she did not state it, but repeated her statement in rather emphatic language, it is not proper for counsel to assume that she did say so and ask if that is the person she told it to."

And again:

The court: "The court has ruled after the witness has once testified that she did or did not do a certain thing then it is improper for counsel to say, When you did such a thing what happened?—assuming as true what has been denied by the witness." Exception was duly preserved to this ruling of the court.

We do not agree with counsel for the People that the testimony of this witness was immaterial. The theory of the

State was, and the argument of counsel now is, that the defendant's presence in the store of the deceased on the morning before the killing was a strong circumstance tending to show that he was there at that time for the purpose of ascertaining the situation, location of the money drawer, etc., with a view to the subsequent commission of the crime, and if it was true that he was there at that time the fact was one which might well be considered by the jury as bearing upon the question of his guilt. He testified, and proved by a number of persons, that he was at his home sick on that Sunday and not out of his house. If those witnesses were entitled to belief, the clear preponderance of the testimony was that Matilda Peterson was mistaken as to his being the man she testified she saw in the store on that morning. But conceding that the weight of the testimony on this question was for the jury, the court limited her cross-examination by counsel for the defendant by too strict a rule. The purpose of a cross-examination is to test the truthfulness, candor, intelligence, memory, etc., of the witness. We do not understand that counsel may not, for that purpose, assume that any previous answer made by a witness is untrue, either from willfulness or want of recollection, and put his questions in various forms to show that fact. He does not thereby assume the witness has testified to a fact which he has not testified to. Of course, the cross-examination must be reasonable, but there is nothing whatever here to show that counsel had pursued his examination to an unwarrantable extent. We think the court erred in refusing to allow the question; also that the court, in sustaining the objection, used language in the presence of the jury prejudicial to the defendant. There is nothing in the testimony of the witness shown from the abstract of the bill of exceptions, directly and positively denying that she made the statement which counsel for the defendant assumed that she did make. As already quoted, what she said was that she did not remember having made the statement. Counsel for the Peo-

ple say that the record shows that she did positively deny the fact. But the abstract, to which we must look, does not show it. The language of the court was: "After * * * the witness has stated that she did not state it, but repeated her statement in rather emphatic language, it is not proper for counsel to assume that she did so and ask if that is the person she told it to." Thus the judge clearly gave the jury to understand that he regarded the witness' testimony as a direct and emphatic denial that she made the statement, whereas her answer was, "I do not remember that I said to the desk sergeant, 'Which one is Briggs?'"

In the examination of the witness Albert Piemental the State's attorney asked the witness, who had identified the defendant as the person who fired the shots:

Q. "Do you see anybody in court that you saw at Peterson's store?"

A. "Yes, sir.

Q. "Who did you see?"

A. "Briggs (pointing to the defendant.)

Q. "Are you positive he is the man that shot Peterson?"

A. "Yes, sir."

Counsel for the defendant objected to the answer and asked that it should be stricken out, but the objection was overruled. The question was clearly improper. It was leading, and asked the witness not only to repeat, but to emphasize, his former statement by saying that he was positive of the identity. We think the objections to the question should in fairness to the defendant have been sustained.

During the examination of the defendant himself the following occurred: Two police officers testified to the manner of the defendant's arrest, and the court allowed one of them, Jenkins, to state that Briggs was not arrested for the murder of Peterson, and what was said at the time between the defendant and himself. The defendant testified: "I was grabbed in a saloon and grabbed and pulled to the sidewalk. I said, 'Send up-stairs,'"—at which point he was in-

interrupted by an objection from the prosecuting attorney, and the court sustained the objection.

The prosecuting attorney: "I move to strike out the answer.

The court: "Strike it out.

Counsel for defendant: "I object to that. The officer said Briggs said, 'If you will come up-stairs I will give you a gun fight.'

The court: "I will sustain the objection to what was done there after his arrest. That is between him and the officers."

But when the officers had stated what occurred between them at that time, was it not proper for the defendant to give his version of the conversation?

The colored man, Portee, testified that after he was taken to the hospital on the night of the shooting, and in the afternoon of the next day, Briggs, the defendant, made certain statements to him. The defendant was asked what was then said, the question being, referring to Portee: "What did he say? Did Portee identify you when you were first brought to him?"

The prosecuting attorney: "We object, and ask that it be stricken out.

The court: "Objection sustained; strike it out."

Briggs was then asked if he heard Portee's testimony at the coroner's inquest.

The prosecuting attorney: "I object."

The objection was sustained, the court saying: "For the reason that the coroner's minutes, which he signed as his statement, is the best evidence of what happened upon that occasion, as has been stated by the Supreme Court, and this is the only evidence that can be introduced."

This ruling was manifestly wrong. The defendant had not introduced the coroner's minutes in evidence and did not rely upon them in his defense, and we are unable to see upon what principle it can be held that the defendant in a case of

homicide is concluded by what took place at the coroner's inquest, as recorded in his minutes. Suppose the witness Portee had signed a statement before the coroner, upon what principle can it be said that statement is conclusive and binding upon the defendant as to what he in fact said?

Again, the defendant was asked whether Portee, the colored man, at the inquest was asked, "You cannot positively identify him?" and that he answered: "Well, I stated before that this man, either he or his brother, they look for the world alike." The prosecuting attorney said, "I object," and the objection was sustained and exception taken.

Defendant was again asked: "Was this question asked and this answer made at the inquest: 'And you say this man (indicating Briggs) looked like the man that fired the shot?' A. 'Yes.' " The question was objected to and the objection sustained.

The object of this examination was to show that the witness Portee, although he positively identified the defendant upon the trial, had previously made statements to the effect that he was not positive of the identification. We think the questions were proper and that the objections should have been overruled.

A policeman, Lieutenant O'Hara, examined on behalf of the People, testified that he found a back door to the store leading to the alley open on the night of the murder. Counsel for the defendant objected and asked that the testimony be stricken out. The court said: "The evidence here is that the defendant walked that way.

Mr. Cantwell (counsel for the defendant): "That *some* defendant did.

The court: "No, this defendant. Two witnesses have testified; the colored man testified that he went out that way."

This was an expression of opinion by the court as to what the testimony proved on a very material fact. It was wholly unnecessary in ruling upon the objection, and we

think most damaging to the defendant. It will be seen that the expression was not, "there is evidence tending to show that the defendant went that way," but, "the evidence here is that the defendant walked that way," which must have been understood by the jury as indicating that the court understood the evidence to prove that this defendant went out at that door, and if the jury believed that Joseph Briggs was the identical party who left the store after the shooting, his defense was foreclosed. At that stage of the trial, even if the jury had understood that the court merely intended to indicate that the evidence up to that time proved that the defendant escaped by that door and that two witnesses had so sworn, the People's case was made out and the burden cast upon the defendant to overcome that proof. Nor are we able to find, from the abstract of the evidence, that two witnesses did directly and positively testify to the fact, as stated by the court. Every lawyer appreciates the fact that any intimation, however slight or unconsciously made by the court in the presence of a jury as to the force and effect of evidence, is most damaging to the party against whom it is made, and in a case of such grave importance to the defendant as this must be held reversible error. It is not the province of the court, in a criminal case, to express any opinion upon the facts, either orally during the trial or in the form of instructions, and when the evidence has all been heard the court should state the law only, and leave the jury to judge of the facts. *Weyrich v. People*, 89 Ill. 90; *Marsen v. People*, 173 id. 43; *Cunningham v. People*, 195 id. 550.

Against the testimony of the two witnesses who identified the defendant as the guilty party, defendant testified, and introduced witnesses whose evidence tended to show, that at the time of the alleged shooting he was in a saloon a short distance from Peterson's store. There can be no doubt, from all the testimony, that the time when he was in the saloon and the time of the killing of Peterson were so nearly together as to render it improbable that he could have

committed the murder; and yet, taking into consideration the difference in timepieces and the liability of witnesses to be mistaken either as to the exact moment of the shooting or of his being in the saloon, it cannot be said that it was impossible that he could have committed the murder. At the instance of the People the court gave the following instruction:

"The court instructs the jury that in this case, what in law is known as an *alibi*,—that is, that the defendant was at another place at the time it is claimed the offense was committed,—is, in part, relied on by the defendant. To render the evidence of an *alibi* satisfactory it must cover the whole time of the transaction in question, so as to render it impossible that the defendant could have committed the act."

It is insisted by counsel for plaintiff in error that this instruction is erroneous and calculated to mislead the jury to the prejudice of the defendant. The objection is, that it requires the proof of an *alibi* to be satisfactory to the jury, whereas the law is, that if such proof is sufficient to raise a reasonable doubt in the minds of the jury it is sufficient; also that it is subject to the objection that it required the defendant to prove that he was at another place during the whole of the time of the killing, so as to render it impossible that the defendant could have committed the act. In answer to these criticisms it is said the instruction is in no sense directed to the measure of proof of an *alibi*, but that its purpose was to define that defense, and in support of the position the case of *Creed v. People*, 81 Ill. 565, is cited. It must be conceded that this decision in the main sustains the contention of counsel, though in that case the instruction passed upon only required proof of the *alibi* "to render it impossible or very improbable that the defendants, or any of them, could have committed the act." In the later case of *Hoge v. People*, 117 Ill. 35, the language of an instruction was: "The law is that the burden of proving an *alibi* devolves upon the accused, and it must be clearly and satisfactorily es-

tablished before it can avail, where the evidence otherwise makes a clear case against the accused." In passing upon it this court said, speaking through the late Justice SCHOLFIELD (p. 44): "To require the defendant to satisfactorily explain his recent possession of the stolen property and to satisfactorily establish an *alibi* before it can avail, is imposing a burden on him but little short of convincing the jury beyond a reasonable doubt, (*Herrick v. Gary*, 83 Ill. 85,) whereas the burden is upon the People to establish his guilt; and if, after considering the evidence introduced by him as to either or both of these questions, in connection with all the other evidence in the case, and giving due consideration to the entire evidence, the jury shall have a reasonable doubt of the defendant's guilt he cannot be convicted."

The authorities, generally, are not harmonious as to the correctness of the instruction here in question. While a lawyer might understand it as in no way directed to the measure of proof required to establish an *alibi* but as simply an attempt to define that defense, it seems apparent to us that the jury would be very liable to construe it differently. In other words, an ordinary jury, following the instruction, might well conclude that there was evidence tending to prove an *alibi* as defined in the instruction, and yet that such evidence was not sufficient to satisfactorily establish that fact. In the case of *Herrick v. Gary*, cited in the opinion in *Hoge v. People*, *supra*, an instruction on behalf of defendant stated that "in order to recover in this case the plaintiff must show by the evidence in the case, to the satisfaction of the jury," etc., and it was said by BREESE, J. (p. 89): "The objection to this instruction is manifest. The first branch of it places the standard of the degree of proof required higher than the law demands in controversies of this character. It is enough that the jury shall believe, from the evidence, that the essential facts are true. The jury may so believe although the same may not be shown by the evidence to the satisfaction of the jury. This instruction requires not merely that the

evidence shall produce belief in the minds of the jury of the facts alleged, but that such belief shall be so strong as to be satisfactory. This is, perhaps, not quite so strong as to require a belief beyond a reasonable doubt, but it approximates it, and which is only required in criminal cases. The mind cannot well be said to be satisfied as to a given proposition so long as such matter remains at all in doubt." So here, the instruction not only required the jury to believe the testimony tending to prove the *alibi*, but that such evidence, to avail the defendant, must be satisfactory,—at least the instruction is liable to that interpretation, and therefore to mislead the jury. We also think, especially in view of the facts of this case, that the instruction is too strict in requiring the proof to cover the whole of the time of the commission of the crime, so as to render it *impossible* that the defendant could have committed it. We think an instruction defining the defense of *alibi* would be sufficient and proper if it simply stated, to render the defense of *alibi* available the proof must cover the whole of the time of the commission of the crime, so as to render it impossible, or highly improbable, that the defendant could have committed the act. It is true, in this case the court instructed the jury properly that if, considering all the evidence, including that of the *alibi*, the jury had a reasonable doubt of the defendant's guilt they should acquit him, and if the only grounds of reversal were the giving of the instruction objected to we should hesitate to reverse the conviction.

Numerous other errors are assigned upon the record and urged as grounds of reversal, some of which might, under other circumstances, call for consideration and decision, but in view of the fact that these errors, if they exist, will not probably occur upon another trial, we deem it unnecessary to consider them now.

The judgment of the criminal court will be reversed and the cause remanded to that court for another trial.

Reversed and remanded.

THE PEOPLE *ex rel.* Bartlett *et al.*

v.

EDWARD F. DUNNE, Mayor of Chicago.

Announced orally February 7, 1906.

1. MANDAMUS—*application for leave to file petition in mandamus is ex parte.* Application for leave to file a petition for *mandamus* is *ex parte*, and, in deciding the question of leave to file, only the petition, and suggestions in support of it, will be considered.

2. SAME—*proper office of writ of mandamus stated.* *Mandamus* lies to compel the performance of some duty which the respondent owes either to an individual or to the public; but the duty must be specific, and of such a character that the court can prescribe a definite act or series of acts which will constitute performance.

3. SAME—*mandamus does not lie to enforce general course of official conduct.* *Mandamus* will not lie to control and regulate a general course of official conduct by the respondent, nor to enforce the performance of official duties generally, though prescribed by statute, it not being practicable in such case for the court to prescribe the particular acts necessary to be done to constitute performance, nor could the court supervise and enforce the doing of such acts.

4. SAME—*a court cannot govern a city by mandamus.* *Mandamus* does not lie against the mayor of a city to compel him to close tippling houses on Sunday or to enforce observance of the liquor laws generally, by forfeiture of licenses, etc., since it is not within the sphere and jurisdiction of a court to assume ordinary governmental functions.

ORIGINAL petition for *mandamus*.

WALTER J. MILLER, and CHURCH, McMURDY & SHERMAN, for relators.

Mr. CHIEF JUSTICE CARTWRIGHT announced the opinion of the court:

Yesterday the relators moved for leave to file a petition for *mandamus*, and presented the petition, with suggestions in support of it. At that time the corporation counsel of the

city of Chicago stated to the court that he had prepared an argument against the motion, which was presented to the court, and since that time a reply to his argument has been presented by the relators. The application in this class of cases is *ex parte*, and nothing has been or will be considered except the petition of the relators, with the accompanying suggestions in support of the motion.

The petition sets out that the defendant, Edward F. Dunne, is mayor of the city of Chicago; that previous to the election he declared that if elected he would not enforce the laws of the State and the ordinances of the city respecting the keeping open of tippling houses on the Sabbath day, and that since his election he has neglected and refused to enforce such laws and ordinances, and has declared his deliberate intention to violate his duty in that respect and not to enforce either of them or to punish violators of them. Attention is called to the statute which imposes upon the mayor the duty and obligation to see that the laws and ordinances are faithfully executed, and the obligation assumed by him, as mayor, to do so. The prayer of the petition is that this court will issue the peremptory writ of *mandamus* to the defendant, enjoining and commanding him, without delay, and by the use, as far as may be necessary for the purpose, of every means, power and authority in that behalf conferred upon the mayor of said city by the laws of this State or the ordinances of the city of Chicago, to proceed, and thenceforth persistently to continue, to enforce within said city the statute of this State prohibiting the keeping open upon the first day of the week, called Sunday, of tippling houses and other places where liquor is sold or given away, and to compel the general observance of the provisions of said law in said city on each and every Sunday thereafter by every person amenable thereto, and to prevent the violation thereof, and secure the prosecution of every person violating the said law in said city, and to punish all violations of said law by licensed dram-shop keepers in said city by the revoca-

tion of their licenses, and generally and at all times to take care that said law is faithfully executed in said city.

The remedy by *mandamus* is one which is allowed to compel the performance of some duty owing to an individual or to the public. The duty must be specific in its nature, and of such character that the court can prescribe a definite act or series of acts which will constitute a performance of the duty, so that the respondent may know what he is obliged to do and may do the act required, and the court may know that the act has been performed and may enforce its performance. It is not necessary, in all cases, that the performance of the duty should consist of a single act. It may be a succession of acts, if the duty is specific and the acts are of such a nature that the court can supervise the performance of the duty and the execution of the mandate. For example, the court may require a railroad company to re-lay a portion of its track which has been taken up, and operate it; to operate its railway as a continuous line; to deliver freight to a certain elevator; to run a daily passenger train for the accommodation of passengers over its road in place of a mixed stock and passenger train, or to stop all its passenger trains at a certain station; but the writ has never been made use of, and does not lie, in this State at least, for the purpose of enforcing the performance of duties generally. It will not lie where the court would have to control and regulate a general course of official conduct and enforce the performance of official duties generally. In such a case the court could not prescribe the particular act to be performed and enforce its performance. It is plain that in this case, where the court is asked to require the defendant to adopt a course of official action, although it is a course required by the statute and imposed upon him by the law, it would be necessary for the court to supervise, generally, his official conduct, and to determine in very numerous instances whether he had persistently, and to the extent of his power and the force in his hands, carried out the mandate of the court and per-

formed his official duty. It is manifest that where there are about seven thousand saloons in a city which are kept open on the Sabbath day in violation of law, as is alleged in this case, the court would not only have to enforce a general course of official conduct on the part of the mayor, but must also determine in numerous instances whether ground existed for the revocation of licenses, whether there had been violations of law, and to what extent he had endeavored to perform his duty with the force and facilities at his command for doing it. The writ will not lie for any such purpose. For the court to assume the management of municipal affairs in the city of Chicago would be to depart from its proper sphere and assume governmental functions, which are outside of the jurisdiction of the courts and not within the remedy by writ of *mandamus*.

Leave to file the petition is denied.

Motion denied.

HERCULES SANCHE

v.

MYRTLE G. MAHLER *et al.*

Opinion filed December 20, 1905—Rehearing denied Feb. 13, 1906.

1. APPEALS AND ERRORS—*when judgment of Appellate Court is final in part only.* A judgment of the Appellate Court sustaining the judgment below in granting a perpetual injunction but remanding the cause on the accounting branch of the case, with directions to permit an amendment of the pleadings, is final as to the injunction but not final as to the accounting.

2. SAME—*party cannot predicate right to writ of error on part of judgment in his favor.* If the judgment of the Appellate Court is severable, being final in part and in part not final, the party favored by the final part of the judgment, and of which he does not complain, cannot predicate his right to a writ of error thereon in order to have reviewed alleged errors in that part of the judgment not final. (*Blackaby v. Blackaby*, 189 Ill. 342, distinguished.)

WRIT OF ERROR to the Branch Appellate Court for the First District;—heard in that court on writ of error to the Circuit Court of Cook county; the Hon. R. S. TUTHILL, Judge, presiding.

The Appellate Court, in disposing of this case, made the following statement of facts, which we think fairly presents the issues as disclosed by the record, and therefore adopt the same as our statement of the case:

“Defendant in error filed his bill of complaint averring, in substance, that he had at great expense devised a certain clinical instrument which he called ‘Oxydonor,’ claimed to be useful in the treatment of disease, for which he had a large sale; that on or about March 15, 1895, he entered into a certain contract with one LaMotte Potter, and in pursuance thereof furnished Potter with money and instruments in value amounting to more than \$3000, together with advertising matter and lists of names; that Potter, instead of opening an office for sale of complainant’s instruments, as the contract provided, organized a corporation through which he proceeded to manufacture and sell a rival and imitation instrument, similar in appearance to the Oxydonor, to which he gave the name of ‘Oxygenor,’ holding it out as an improvement on the original instrument; that Mahler, one of the defendants, combined with Potter, and they devised another instrument called ‘Perfected Oxygenor King,’ a very close imitation of the Oxydonor, and which they made and sold with the money provided by complainant and on the reputation of complainant’s instruments; that Potter subsequently sold out to Mahler and his associates and has since disappeared; that a co-partnership called the Oxygenor Company was formed, of which Mahler and other defendants are members, and that the members of such co-partnership are seeking to divert the complainant’s trade to their own profit, holding out the Oxygenor as being the latest im-

provement on the Oxydonor or an equal thereto, claiming that Potter, as an employee of complainant, became possessed of the complainant's secret formulæ. The bill alleges that Mahler has admitted he acquired Potter's rights under the contract with the appellee, and avers that the defendants, composing the Oxygenor Company, took Potter's interest charged with full knowledge of the trust raised by said contract. Complainant prays that the contract of March 15, 1895, be construed as creating a trust against Potter and his assignees, for an order requiring them to turn over to the complainant their business, books and accounts, for the appointment of a receiver and for an injunction.

"Defendants, except Potter, answered, denying the execution of the contract by Potter and denying that he ever opened an office in Chicago to carry out the terms of such alleged contract. They assert that Potter, knowing the Oxydonor to be inert, inoperative and a fraud on the public, devised a different instrument, which he called the 'Oxygenor,' and which he publicly made and sold in Chicago from 1895 to 1898 without any attempt by the complainant to claim or assert any adverse right; that in January, 1898, the other defendants formed a co-partnership and bought out Potter in good faith and for value, without notice of any alleged trust between Potter and complainant, and that Potter thereafter ceased to have any interest in defendant's business. They deny they ever stated that their instruments were those of complainant or that they acquired from Potter complainant's secret formulæ; deny all fraud, all unfair competition, that they have acted contrary to any trust imposed on Potter by his contract with complainant, and aver that complainant has no right to make and sell the Oxydonor, because that right has been vested by him in a corporation, and that the letters patent of said Oxydonor have been held void in a suit relating thereto by a Circuit Court of the United States.

"The master to whom the cause was referred to report on the law and the facts, reported that the contract between

complainant and Potter was valid; that afterward the acts of the parties thereto amounted to a complete abandonment of it, but not to a technical rescission; that complainant had furnished Potter with money and property of the value of more than \$3000, and that Potter failed to comply with the contract. The master concludes that a fiduciary relation between complainant and Potter is established; that Potter, as soon as he got his equipment from complainant, violated his contract with the latter and betrayed complainant's confidence; that he manufactured and sold an imitation of complainant's goods calculated to deceive the public, using the complainant's trade-marks and testimonials; that Potter received all the contract called for, was the first to violate it and cannot rescind without refunding. The master concludes that Potter, in using means furnished by complainant for his own private benefit and violating the terms of the contract, violated the trust thereby created, and that subsequently defendants had full knowledge of the fiduciary relation between complainant and Potter and took all Potter's rights in the contract charged with the trust therein raised; that the equities are with complainant and the prayer of the bill should be granted.

"A decree was entered declaring plaintiffs in error trustees for complainant, liable to account to him as such, and restraining them from manufacturing, selling, advertising or dealing in the Oxygenor, Improved Oxygenor and Perfected Oxygenor King, or other clinical instruments resembling those devised by complainant. The master is directed to take and state an account and to ascertain and report defendants' profits and the damages sustained by the complainant through the defendants' unlawful acts. Subsequently, upon the defendants giving bond in the sum of \$3000, the injunction and other proceedings were stayed."

From the decree entered in the circuit court of Cook county plaintiff in error sued out a writ of error in the Appellate Court, and upon a hearing in that court judgment

was entered reversing the decree and remanding the cause with directions, and this writ of error is sued out to review the judgment of the Appellate Court.

EDWARD J. HILL, for plaintiff in error.

F. M. BURWASH, for defendants in error.

Mr. JUSTICE RICKS delivered the opinion of the court:

Defendants in error have raised the question of jurisdiction of this court to consider the cause upon its merits, for the reason that the judgment of the Appellate Court is not a final judgment.

The decree of the trial court consisted of two parts, namely, awarding a perpetual injunction and providing for an accounting. The Appellate Court sustained the injunction, but held the accounting in abeyance until, on further investigation, it should be made to appear that in commencing this suit plaintiff in error has not been guilty of *laches*, and reversing the decree and remanding the cause with directions.

That part of the judgment of the Appellate Court in reference to the remanding order is as follows: "Therefore it is considered by the court that for that error, and others in the record and proceedings aforesaid, the decree of the circuit court of Cook county in this behalf rendered be reversed, annulled, set aside and wholly for nothing esteemed, and that this cause be remanded to the circuit court of Cook county, with directions to that court to allow complainant to amend his bill, and for further proceedings not inconsistent with the views expressed in the opinion of this court this day filed herein." The judgment, as will be seen, is to proceed in accordance with the opinion of the Appellate Court. In the opinion of the Appellate Court it was said that in so far as the decree awarding a perpetual injunction is concerned it is sustained, and so far as that part of the judgment of the

Appellate Court is concerned it cannot be reviewed upon this writ of error for the reason that it is in favor of the plaintiff in error. The only part reviewable in this court would be that part of the judgment reversing and remanding which provides for an amendment and accounting; and so far as this part of the judgment is concerned it cannot be held to be a final judgment, from which a writ of error could be sued out or appeal prosecuted.

The rule in reference to prosecuting appeals and writs of error from judgments of the Appellate Court is properly stated in *Hagemann v. Hagemann*, 188 Ill. 363, wherein it is said: "The judgments of the Appellate Court from which appeals may be taken to this court are of three classes: First, judgments affirming the judgments, orders or decrees of the inferior court; second, judgments entering final judgments in the Appellate Court; and third, judgments reversing the judgments, orders or decrees of the inferior court and remanding the cause with such directions to the inferior court as that no further proceedings can be had or taken in the trial court except to carry into effect the mandate of the Appellate Court."

The plaintiff in error relies upon the case of *Blackaby v. Blackaby*, 189 Ill. 342, (first reported in 185 Ill. 94,) to sustain his position as to the right of writ of error. This case is not similar to that case. There, the appellant, John Blackaby, was in possession of certain lands, and the appellees claimed to be tenants in common with him and brought their suit for partition and accounting. A decree was entered finding that the parties were tenants in common and that the appellees were entitled to partition. The chancellor, without referring the cause, erroneously disposed of the question of accounting between the parties. John Blackaby prosecuted an appeal from that decree to this court, and we reversed the decree of the lower court and remanded the cause "with directions to proceed in accordance with the views expressed in the opinion filed in this cause," which is almost identical

with the language of the remanding order in the case at bar. In the *Blackaby* case we pointed out in our opinion and expressed the view that the evidence was sufficient to warrant the decree for partition, but that the court, in passing upon the question of accounting without a reference to the master to state the account, committed error, and for that reason remanded the cause to the circuit court. (*Blackaby v. Blackaby*, 185 Ill. 94.) After the cause was remanded to the circuit court John Blackaby insisted upon offering evidence going to the question of partition and ownership of the land, and insisted that the cause was open for all purposes. His contention was denied by the chancellor, and on appeal to this court we held that the decree was final as to the question of partition, and that the only open question was the one relating to the accounting. It will be noticed that in that case that part of the decree that was made final on the first hearing by this court was against John Blackaby, who both times brought the record to this court. In the case at bar, however, as we have already said, so much of the decree as was made final by the mandate and opinion of the Appellate Court was in favor of the plaintiff in error, and he could not and does not complain of that here upon this writ. The question of the injunction and of the accounting are severable, and we can see no reason for holding that plaintiff in error can predicate his writ of error on a final judgment of which he does not complain, and ask to have alleged errors as to that part of the judgment that is not final reviewed by us.

We are clear that the judgment of the Appellate Court, in so far as it relates to the question of accounting, is not a final judgment, and that a writ of error does not lie in this court. The writ of error will accordingly be dismissed.

Writ dismissed.

PHILIP FALTER *et al.*

v.

JOHN E. PACKARD *et al.*

Opinion filed December 20, 1905—Rehearing denied Feb. 13, 1906.

1. ESTOPPEL—*when city is estopped to claim title to land.* A city is estopped in a partition suit to claim title to the land involved, where, within twenty years prior to the filing of the bill, it conveyed the land, which had been deeded to the city for taxes, to the complainants' father, and within but a few years prior to the filing of a bill condemned a portion of the land for a highway and levied a special assessment against it as the property of the complainants' father, who paid the taxes on the land each year after he received the deed therefor.

2. PRESCRIPTION—*twenty years' user is only prima facie evidence of easement.* Twenty years' user is only *prima facie* evidence of the right or title to an easement, and the user must be adverse, exclusive, continuous and uninterrupted, under claim of right, with the knowledge of the owner of the land but without his consent.

3. SAME—*what does not establish a highway by prescription.* Proof that a strip of land marked "reserved" on a plat was for many years open prairie, so that teams or pedestrians could pass through it without obstruction, does not establish a highway by prescription.

APPEAL from the Superior Court of Cook county; the Hon. AXEL CHYTRAUS, Judge, presiding.

This was a suit in partition, begun in the superior court of Cook county by John E. Packard, claiming to be the owner of an undivided half interest in a certain strip of land sixteen feet in width and about six hundred feet long, in the city of Chicago, alleging that his sister, Felicia N. Norris, was the owner of the other undivided half interest in said premises. The bill made Philip Falter and about forty others parties defendant, together with the city of Chicago, asserting that all the defendants claimed to have some right or interest in and about said property but in fact had none, and

prayed for partition of the strip of ground in question and that all persons named defendants answer, and prayed for general relief. The city of Chicago answered, denying that either complainant or his sister, Felicia N. Norris, was the owner of the strip of ground in question, but claiming that the strip of ground had been for over twenty years a public alley, and that complainant and Felicia N. Norris have no private or special rights thereto, but that the fee was vested in the city of Chicago for the use of the public, and that the strip had been in possession of the public for more than twenty years last past, and that the public owned the fee; denied that the complainant is entitled to the relief prayed or any part thereof, and denied all the allegations of the bill and asked that the bill be dismissed, etc. Appellant Falter and five others answered, denying all the allegations of the bill, the answer being practically the same as the one filed by the city of Chicago.

The cause was referred to the master in chancery to take testimony and report both conclusions of law and fact. The master made his report recommending the dismissal of the bill, and finding that neither appellant nor Mrs. Norris had any interest in the premises in question. Objections were filed to the master's report, which stood as exceptions, by agreement, upon trial before the chancellor. The chancellor, upon hearing, found that complainant, John E. Packard, was the owner in fee simple of the undivided one-half of the premises in dispute and that Mrs. Norris was the owner of the other undivided one-half mentioned, and that no person or persons other than the said complainant and Felicia N. Norris had any interest in or title to said described premises, etc. The chancellor sustained the exceptions to the master's report and entered his decree accordingly, from which an appeal is prosecuted to this court.

ROGERS & MAHONEY, and CHILTON P. WILSON, for appellants Philip Falter *et al.*

WILLIAM D. BARGE, (JAMES H. LEWIS, Corporation Counsel, of counsel,) for appellant the City of Chicago.

EUGENE H. GARNETT, (GWYNN GARNETT, of counsel,) for appellees.

Mr. JUSTICE RICKS delivered the opinion of the court:

The only question in dispute is whether or not the parcel of land described in the bill is private land belonging to the appellee Packard and his sister, or a public alley. Appellants, Philip Falter and others answering with him, apparently have no interest in or claim any title to the premises in dispute but own property abutting the property in question, and for that reason have joined in the appeal. No question was raised as to their right of appeal, and we therefore pass no opinion upon whether or not they are proper parties and have a right to appeal to this court. They have filed a brief and argument, and appellant the city of Chicago has filed a separate brief and argument, setting up what it considers its rights in the premises.

The evidence in the record discloses that in 1854 twenty acres of land were platted and laid out into lots and blocks by Messrs. McCaulley, Swift and Tyrrell. The plat as introduced in evidence shows the streets and alleys and lots and blocks and the strip in question. The strip was marked and indicated upon the plat in a manner different from the streets, alleys, lots and blocks, and opposite block 1 and block 4 the word "reserved" appears. It also appears that for a great many years after the tract was subdivided it was an open prairie and no attention was paid to the streets and alleys. The tract in dispute lay along the east side of the addition as laid out by McCaulley, Swift and Tyrrell and west of a strip that is shown on the map as Brand's subdivision. It appears from the record that no one paid any attention to the strip of land from 1854 until 1867, when it

was sold for taxes to the city of Chicago, and in 1869, pursuant to that sale, the city of Chicago conveyed it to one P. Hazard Smith, and on March 7, 1872, Smith conveyed it to his son, and in 1886 the latter conveyed it to Philip E. Stanley, and on March 29, 1886, and again on December 17, 1886, by two different deeds Stanley conveyed the premises to John A. Packard, who was the father of appellees, Packard and Mrs. Norris. It further appears that the county clerk of Cook county conveyed the premises to the city of Chicago in 1877 for taxes, and that the city of Chicago, by a deed dated December 3, 1885, conveyed the same to John A. Packard. On August 19, 1898, John A. Packard died testate, and by his will he devised the premises to his daughter, Mrs. Felicia N. Norris, and on August 28, 1901, she conveyed to the complainant, John E. Packard, an undivided one-half interest therein. As to the payment of taxes previous to the year 1885 upon the tract of land the record is silent, but shows it was sold for the taxes in 1866. But from the year 1885 to 1897 the taxes were levied and duly paid by John A. Packard, and from 1898 to 1900, at the time of filing this bill, the taxes were paid by Mrs. Norris. The total amount of taxes and redemption money paid by Mr. Packard and Mrs. Norris, exclusive of interest, as stipulated, is shown to be about \$1650. Mrs. Norris claimed title by reason of the two deeds above mentioned to her father and payment of taxes for more than seven years.

It will be seen from what has already been said that by the plat of the subdivision no interest in the strip of land passed to the city or the public, and that by the plat the strip was not subjected to any servitude, and we can hardly see how any dominant estate was thereby created in any adjoining land.

It also appears from the record that the city of Chicago opened what is known as Henry street, which ran both east and west from this strip of land, across said strip. The record discloses that an ordinance for the opening of said street

across this strip was passed May 18, 1885, and that on August 21, 1885, the city of Chicago filed in the superior court of Cook county a petition in condemnation to open Henry street across this strip of sixteen feet. It is alleged in this petition that a part of the strip sought to be taken, similarly situated with the remainder, was at that time private property. That petition was prosecuted to a trial by jury, and, after a verdict, judgment was rendered for \$200, to be paid to the owner of the part of the strip taken, as for private property taken for public purposes. Thereafter, on June 3, 1899, an order was entered in that proceeding compelling the city to pay to the clerk of the court the sum of \$200, and authorizing the city to take possession of the part of the strip condemned. Later, on February 25, 1901, an order was entered therein in said cause, finding that at the time of his death, on August 19, 1898, John A. Packard was the owner of the part of the strip taken, and directed that the \$200 be paid to John E. Packard, his executor, and to Felicia N. Norris, or their solicitors. Furthermore, it is stipulated that for the specific benefit derived from the opening of Henry street across said strip an assessment upon private property was made; that on the making and levying of such assessment the remainder of the sixteen-foot strip was assessed for such special benefits the sum of \$200, and that for the benefits to the public the city of Chicago was also assessed the sum of \$182.73. The assessment was collected in full and the damage paid for the property.

We can hardly see how the city of Chicago can be serious in its contention that the strip of land in question was dedicated to the public for an alley, after making a deed to the appellees' father and setting up the facts it did in the condemnation suit, and condemning a part of said strip, acknowledging the property in question at that time belonged to appellee Mrs. Norris. It is not claimed by either party that there was a statutory dedication of the strip of land in question for alley purposes, nor is it seriously contended that

there was a common law dedication, inasmuch as where land for a public street is claimed under common law dedication, it must clearly appear that it was the intention of the land owner to donate his land to the public and that the public has accepted the same. In the case of *City of Chicago v. Borden*, 190 Ill. 430, it is said (p. 442): "In order to constitute a dedication at common law it is essential (1) that an intention on the part of the proprietor of the land to donate the same to the public use; (2) an acceptance thereof by the public be established by the evidence; and (3) that the proof as to these facts must be clear, satisfactory and unequivocal." There is no evidence whatever that there was any intention on the part of the proprietors of this land to donate the same to public use, but, on the other hand, the plat itself refutes this idea, the word "reserved" appearing on the strip as platted, in two different places, so it cannot be held that there was either a common law or statutory dedication.

It is, however, more seriously contended that there was a highway by prescription and user. The acquisition of an easement, such as a public right of way, by way of prescription arises from knowledge and the Statute of Limitations, and requires proof of user and enjoyment for at least twenty years, and the better authorities now hold that the running of the statute would raise merely a presumptive right or title which may be rebutted. (Washburn on Easements,—4th ed.—sec. 126.) So that the twenty year user and enjoyment of the highway by the public is only *prima facie* proof of title or right to the easement, and the user or enjoyment must be adverse, exclusive, continuous and uninterrupted under claim of right, with the knowledge of the owner of the estate yet without his consent. *City of Chicago v. Chicago, Rock Island and Pacific Railway Co.* 152 Ill. 561; *Dexter v. Tree*, 117 id. 532; *Illinois Central Railroad Co. v. City of Bloomington*, 167 id. 9; *Chicago, Burlington and Quincy Railroad Co. v. Ives*, 202 id. 69.

The case of *Rose v. City of Farmington*, 196 Ill. 226, was a bill to enjoin the closing and obstructing of a way across the north end of the city, which was used and enjoyed for upwards of twenty years. The subject of prescriptive rights and titles was discussed, and the court, in part, said: "It appears that appellee is the owner of a lot in the city of Farmington lying south and west of appellant's premises, and that appellant claims a right, by prescription, to use the north twelve feet of appellee's lot as a driveway to get to that part of her premises lying east of appellee's lot. Appellee was about to erect on its premises a building which would cover the whole of this strip claimed as a driveway by appellant. In order to establish a way by prescription the use and enjoyment of what is claimed must have been continued for a long period, to-wit, twenty years. It must have been adverse, under a claim of right, exclusive, continuous, uninterrupted, and with the knowledge and acquiescence of the owner of the land in or over which the easement is claimed. The adverse use which will give title, by prescription, to an easement is substantially the same in quality and characteristics as the adverse possession which will give title to the land in fee. (Washburn on Easements, 131; 19 Am. & Eng. Ency. of Law, 11; *City of Chicago v. Chicago, Rock Island and Pacific Railway Co.* 152 Ill. 561.) The adverse possession which is required to constitute a bar to the assertion of a legal title by the owner of it must include these five elements: It must be (1) hostile or adverse; (2) actual; (3) visible, notorious and exclusive; (4) continuous; and (5) under a claim or color of title. (*Zirngibl v. Calumet Dock Co.* 157 Ill. 430.) * * * To create the presumption of a grant of the right of way, the circumstances attending its use must be such as to make it appear that it was established for the benefit of claimant, or that it was accompanied by a claim of right, or by such acts as manifested an intention to enjoy it without regard to the wishes of the owners of the land. The use must have been enjoyed under such circum-

stances as will indicate that it has been claimed as a right, and has not been regarded by the parties merely as a privilege or license, revocable at the pleasure of the owners of the soil. (*Dexter v. Tree*, 117 Ill. 532.) While the acquiescence of the owner may be shown by his acts, he is allowed to testify to what his intention actually was, to be considered in connection with all the other facts and circumstances in the case. (*City of Chicago v. Chicago, Rock Island and Pacific Railway Co.* 152 Ill. 561.) In the case at bar the alleged way was merely a convenience for the owner of the lot north of it. It was not a necessity, for he could drive over his own lot to reach that portion lying east of appellee's lot. It is a matter of common observation that the public makes use of any open, unenclosed space which affords a more convenient way of reaching any given place than the regular way would, and it would be contrary to established legal principles, and to natural justice as well, to allow the public, under such circumstances and by the mere acquiescence of the owner, to acquire the permanent right of way."

The evidence in the record is very meagre on the subject of user of the particular strip of land by the public. Appellant Falter testified that he had lived in the immediate neighborhood for thirty years, and for about twenty-six years he knew the use that had been made of the sixteen-foot strip in question. He testified: "Well, it [the strip] has been used some twenty-six or twenty-seven years ago, people driving through there, but sure not in the shape it is now. It was just open prairie, you might say." His evidence is substantially the same as that of other witnesses who testified in reference to the use of the property for street purposes, and we deem it sufficient to say that the evidence does not support or establish the continued use, without interruption, for a period of twenty years. While it is true that for a great many years the strip was open and unobstructed, so that anybody could pass through it and teams and pedestrians have had ingress and egress to and from it, this is not sufficient, espe-

cially under the conditions as shown to exist by this record. The city of Chicago, which is the other real party in interest, having deeded the property to appellees within the last twenty years and within the two or three years next preceding the filing of the bill, brought condemnation proceedings for the purpose of condemning a part of the ground in question, and by its allegations and conduct in that proceeding acknowledged the appellees to be the rightful owners of the property. By selling the property to appellees' ancestors, by condemning a highway across the same, by taxing said premises from year to year and levying special assessments against the same, the city is estopped to now assert title to said strip. (*Shields v. Ross*, 158 Ill. 214; *Illinois Central Railroad Co. v. City of Bloomington*, 167 id. 9.) And besides, it is not shown from the record that the proper public authorities have exercised any authority and control over the property in question by superintending or keeping it in proper repair adverse to the owners of the land. In fact, it appears that the strip has never been wholly enclosed. It was not at the usual place for an alley, but was along the side of the addition and parallel with the lots as laid out by McCaulley, Swift and Tyrrell, and was between that addition and other vacant lands that would probably at some future time be laid out. Its use was not necessary for access to the properties of the addition of which it was a part, and whatever may have moved the original owners, at the time of platting, to have merely designated it as a reserve strip can only now be a matter of conjecture.

We think the record wholly fails to show such user, or user under such circumstances, by the public as would raise the presumption of a grant or give a prescriptive right.

We are satisfied with the decree entered by the superior court, and it is accordingly affirmed.

Decree affirmed.

D. M. OTTIS

v.

R. M. SULLIVAN, County Treasurer.

Opinion filed December 20, 1905—Rehearing denied Feb. 13, 1906.

1. APPEALS AND ERRORS—*alleged defective ordinance should be contained in the abstract of record.* The Supreme Court will not search the record for alleged defects in a special assessment ordinance where the appellant has failed to set out any part thereof in the abstract of record.

2. SPECIAL ASSESSMENTS—*lots assessed as one parcel will be presumed to have been improved as one.* Lots assessed as one parcel will be presumed, on appeal, to have been improved as one parcel, in the absence of anything in the record to show the contrary.

3. SAME—*when record and report may be amended.* Under section 191 of the Revenue act, where the first installment of a special assessment appears in the city treasurer's report and the tax judgment sale and redemption record against one of two lots assessed as one parcel and the second installment against the other, it is proper, on application for judgment of sale, to grant leave to amend the report and record to show the true facts.

4. SAME—*when entry of judgment is erroneous.* Where an assessment is confirmed against two lots as one parcel but the first assessment appears against one lot and the second against the other in the tax judgment sale and forfeiture record, and the county treasurer fails to make an amendment, allowed by the court, to show the facts, it is error to enter a judgment of sale in such condition of the record.

5. SAME—*defects in delinquent list and in notice are waived by general appearance.* Alleged insufficiencies in the published delinquent list and in the notice of application for judgment of sale are waived where the objector appeared and made a general defense.

APPEAL from the County Court of Sangamon county;
the Hon. G. W. MURRAY, Judge, presiding.

E. S. SMITH, for appellant.

ALBERT SALZENSTEIN, and ROY M. SEELEY, for appellee.

Mr. JUSTICE RICKS delivered the opinion of the court:

This is an appeal from a judgment and order of sale of the county court of Sangamon county in favor of appellee, as county collector and county treasurer, for certain special assessments for the paving of part of Allen street, in the city of Springfield.

Appellant first attacks the paving ordinance and urges several grounds upon which it is claimed the ordinance is void, but as appellant did not see fit to abstract the ordinance or to set out any part of it in the abstract, as required by the rules of this court, we do not feel called upon to go to the record and examine the entire ordinance to ascertain if we may discover any defects in it.

It is next urged that the assessment is void because lots 11 and 12 and the south six feet of lot 13, in block 5, were assessed as one parcel. By section 41 of the act of 1901 amending the act in regard to local improvements (Laws of 1901, p. 106,) it is provided that "several lots or parts of land owned and improved as one parcel may be assessed as one parcel." We have examined the abstract, and there is no evidence in the record tending to show that these lots were not owned and improved as one parcel, and in the absence of evidence to the contrary will indulge the presumption that the officers making the assessment properly treated it as one parcel.

The first installment and interest amount to \$97.40 and the second installment and interest amount to \$69.25. As extended on the tax judgment sale, redemption and forfeiture record, and as described in the advertisement of the delinquent list and application for judgment and order of sale, the first installment was placed against lot 11 and the second installment against lot 12. On the hearing appellant objected to the introduction of the report of the city treasurer to the county treasurer of the delinquency of these installments and the property to which they related, and also

objected to the delinquent list as published in the application for judgment, on the ground that neither the tax nor the warrant for the collection of the same was properly described. Cross-motion was made by appellee to amend the return or report of the city treasurer to the county treasurer, and also for leave to amend the tax judgment sale, redemption and forfeiture record, so as to show that the two amounts mentioned as the two installments of the assessment were each levied against all the property objected for as one parcel. In connection with the motion the testimony was heard, and it appeared that at the time the city treasurer reported to the county treasurer he reported not only the delinquency of appellant's property, but incorporated in the one report all the delinquent lands and lots upon which special assessments were due, and made, or attempted to make, one certificate cover all of them. It also appeared that the county treasurer, for his own convenience, separated the various lists that had been sent or delivered to him by the city treasurer, so that the paper relating to the lands of appellant had neither an affidavit nor a certificate attached to it. The court granted leave to amend both the report of the city treasurer and the tax judgment sale, redemption and forfeiture record, and the amendment was made as to the report of the city treasurer to the county treasurer, and the appellant's objection overruled.

In the original report of the city treasurer to the county treasurer he states that he sends with the delinquent list the warrants issued to him for collection. It is now urged that the warrants were not introduced in evidence, and that the amendment did not sufficiently refer to or describe the warrants issued for the collection of the special assessments; and further, that the record does not show, except inferentially, that any warrants were ever, in fact, issued. We have no doubt that under section 191 of the Revenue act it was competent for the county and city treasurers to make the amendments, as they related to an informality in the pro-

ceedings of the officers and did not affect the substantial justice of the tax, and the contention that it was filed with the county court before whom the cause was then being heard, instead of with the county treasurer, would not make any difference.

We are also of the opinion that the amended report of the said treasurer sufficiently showed the tax assessment, and the property against which judgment should be had, as well as the owner thereof, and that a description of the warrant by setting out the ordinance under which the certificate was issued was sufficient. It seems, however, that although leave was granted to the county treasurer to amend the tax judgment sale, redemption and forfeiture record so as to show that the property against which the judgment for sale was asked was assessed as one parcel and that the two amounts were but two installments of the same assessment, the amendment was not, in fact, made, and the court proceeded to judgment with the record still standing showing one of the installments as an assessment against one of the lots and the other installment as an assessment against another of the lots, and the judgment, for that reason, is not in conformity with the facts or the law and must be reversed.

Objection is also made as to the sufficiency of the delinquent list and advertisement of notice of application for the sale of the premises. Appellant entered his general appearance and urged general objections against the assessment, and in such case it becomes immaterial whether the delinquent list as advertised, and the notice and certificates belonging to the same, are correct or not. The purpose of such advertisements is to obtain jurisdiction of the property and person, and when personal appearance is entered and a general defense made the owner of the property has had all the benefit that a correct advertisement could give him. *Mir v. People*, 106 Ill. 425; *Hintze v. City of Elgin*, 186 id. 251; *Cairo, Vincennes and Chicago Railway Co. v. Mathews*, 152 id. 153; *McManus v. People*, 183 id. 391.

For the failure of the county treasurer to amend the tax judgment sale, redemption and forfeiture record in accordance with the leave given by the court, and the court having entered an erroneous judgment upon the record as it stood, the cause will be reversed and remanded, with directions to permit the county treasurer to make the amendment and to enter a new judgment in accordance with the statute.

Reversed and remanded, with directions.

HENRY H. GAGE*

v.

THE PEOPLE *ex rel.* John J. Hanberg, County Treasurer.

Opinion filed December 20, 1905—Rehearing denied Feb. 15, 1906.

1. SPECIAL ASSESSMENTS—*when recital as to notice of re-docketing is sufficient on collateral attack.* A recital in an order of the county court re-instating a special assessment proceeding, that the transcript of the order of the Supreme Court reversing the judgment and remanding the cause had been filed in said court for more than ten days and that due notice had been given that a motion would be made by the petitioner to re-docket the cause, is a sufficient showing, on collateral attack, as to notice of re-docketing.

2. SAME—*orders re-instating a cause do not require formality of a judgment.* Orders re-instating a cause for further proceedings are not adjudications of issues and do not require the formality of a judgment.

3. SAME—*judgment may refer to a following schedule.* It is not a valid objection to a special assessment judgment that, instead of using the word "aforesaid" and following the schedule containing the list of the property and the several amounts, it refers to a following attached schedule and makes the same a part of the judgment.

4. SAME—*when judgment does not allow a double recovery of printer's fees.* A special assessment judgment rendered for the special assessment, printer's fees and costs, means printer's fees and other costs, since printer's fees are one item of the costs and can be taxed but once.

*Consolidated case, being Nos. 4505, 4510 and 4511.

APPEAL from the County Court of Cook county; the Hon. ORRIN N. CARTER, Judge, presiding.

F. W. BECKER, for appellant.

ROBERT REDFIELD, and JOHN M. O'CONNOR, (JAMES H. LEWIS, Corporation Counsel, of counsel,) for appellee.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

This is a consolidated case, consisting of three appeals from judgments of the county court of Cook county under special assessment warrants numbered 24,014, 25,532 and 25,773, upon applications of the county collector of said county, against lands and lots of appellant.

There was but one objection filed in each case in the county court, and it was based on allegations that in the year 1903 judgments were entered in other cases under the same warrant for the collection of the same special assessment; that on appeal the judgments were reversed by this court and the proceedings were remanded generally to the county court; that the proceedings were not properly re-docketed in the county court, and that therefore the former proceedings for the same cause of action were still pending in this court. When the objection came on to be heard the collector asked the court for leave to withdraw the former applications, and the court granted the request and discontinued the same. Appellant contends that the county court had no jurisdiction to dismiss or discontinue the previous applications, and that the leave given was futile to remove the objection, because said previous applications were not properly re-instated in the county court and were still pending in this court. The ground upon which it is insisted that the proceedings were not properly re-instated is, that there was no evidence of notice to the appellant before re-instatement, as required by the statute. The order of the county court re-instating the proceedings in each case recited that

the transcript of the order of this court reversing the judgment and remanding the cause had been filed in said court for more than ten days, and that due notice had been given that a motion would be made by said petitioner to re-docket said cause and for further proceedings in conformity with the opinion of this court. The notice so recited in the order was in substantial compliance with the statute, and in this collateral proceeding the recital was sufficient. *Donlin v. Hettinger*, 57 Ill. 348; *Law v. Grommes*, 158 id. 492.

The objection that the order of the county court dismissing the other proceedings was null and void constitutes a purely collateral attack on that order and judgment, and the recital of due notice is not overcome by anything in the record.

It is further contended that the orders re-instating the cases were nullities, for the reason that the *ideo consideratum est* was wanting and there was nothing amounting to a judgment by the court. The orders of a court in the progress of a cause do not require the formality of a judgment, and the orders re-instating the cases do not purport to be judgments in favor of either party. They were not adjudications of issues. There was no recovery of any sort and no relief was granted. The court overruled the objection filed by appellant, and did not err in so doing.

Appellant makes several objections to the judgments, one of which is, that they do not conform to the statute. They are not in the precise form given in the statute but are the same in substance. The judgments are entered against the tracts or lots of land or parts of tracts or lots set forth in the schedules thereto attached, which were made a part of the judgments. The schedules show the several amounts for which the judgments were entered against each tract, and there is no material difference between a judgment where the list precedes it and one where the list follows. It is not a valid objection that a judgment, instead of using the word "aforesaid" and following the list, is followed by the list

referred to, and a judgment like this was held to be substantially in the form directed by the statute in the case of *Dickey & Baker v. People*, 213 Ill. 51. In the case of *Gage v. People*, 213 Ill. 347, it was said that the judgment against the tracts or lots of land set forth in the schedule attached thereto would have been sufficient if the schedule had shown the property and the several amounts due for the assessment and costs.

Another objection is, that the judgments are rendered for the special assessments, printer's fees and costs and that printer's fees are taxed and collected as costs, so that the judgments allow a double recovery for printer's fees. The printer's fees are one item of the costs and can be taxed only once. The meaning of the judgments is, that they are for printer's fees and other costs. They do not allow double recovery.

Counsel say that there were two judgments entered in each case on different days, but the statement is not borne out by the record. We find but one judgment in each case.

The judgments are affirmed.

Judgments affirmed.

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY
v.

ARTHUR A. WEBER, Admr.

Opinion filed December 20, 1905.

1. EVIDENCE—*papers rendered admissible by section 15 of Evidence act are original evidence.* Under section 15 of the Evidence act, providing that the papers, entries and records of any corporation may be proved by a copy thereof, certified under the hand of the secretary, clerk, cashier or other keeper of same, to which the seal of the corporation, if it has one, shall be affixed, the papers, etc., therein mentioned are original and not secondary evidence.

2. SAME—*certified copy of lease of railroad lines is admissible under section 15 of the Evidence act.* A copy of a lease of its lines by a railroad corporation, certified by the proper officer and bear-

ing the seal of the corporation, is admissible as a "paper" of the corporation, within the meaning of that term as used in section 15 of the Evidence act. (*C., W. & V. Coal Co. v. Moran*, 210 Ill. 9, distinguished.)

3. SAME—*when question as to whether defendant was operating railroad at time of injury is one of law.* In an action for personal injury against a railroad company, where the only evidence tending to contradict the defendant's proof that it had leased its lines prior to the time of the injury is a folder issued after that time on which the defendant's name is stamped, which the evidence shows was not issued by the defendant nor authorized by it but was issued by the lessee company, which was not a party to the suit, the question whether defendant was operating the road at the time of the injury is one of law for the court.

4. RAILROADS—*servants of lessee are not servants of lessor for purpose of service of process.* The fact that a lessor railroad is liable for the negligence of the lessee railroad and its servants in operating the railroad, does not render the lessee, and its servants, servants of the lessor railroad for the purpose of accepting service of process, and service of process on an agent of the lessee is not a legal service upon the lessor.

MAGRUDER, J., dissenting.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Adams county; the Hon. A. AKERS, Judge, presiding.

On September 29, 1903, appellee, as the administrator of the estate of Frederick Weber, sued appellant in an action on the case for an injury resulting in the death of his decedent by such decedent being struck by a locomotive and train of cars on appellant's railroad near Quincy, at the crossing of a public highway. The declaration counts directly upon the negligence of appellant and its servants. The summons bears the date of bringing the suit, and the sheriff's return thereon was in words following: "Not being able to find the president of the within named the Chicago, Burlington and Quincy Railroad Company, I have served the within summons on the within named the Chicago, Burlington and Quincy Railroad Company by reading the same and deliv-

ering to E. F. Bradford, agent of the said Chicago, Burlington and Quincy Railroad Company, a true copy of the within, this second day of October, 1903."

Appellant is incorporated under the laws of the State of Illinois as the Chicago, Burlington and Quincy Railroad Company, and will be hereafter referred to as the railroad company. There is also a corporation incorporated under the laws of the State of Iowa and doing business in this State under the name of Chicago, Burlington and Quincy Railway Company, which will be hereinafter referred to as the railway company.

The defendant (appellant) filed its duly verified plea in abatement, averring that at the time of the serving of said summons upon the defendant the said Bradford was not the agent at Quincy or elsewhere, and prayed that the writ be quashed. Appellee replied, tendering issue upon the above plea, and upon a trial by a jury the issue was found for the plaintiff and his damages were assessed at \$6000, and the court, after overruling a motion for a new trial, entered judgment upon the verdict. Appellant prosecuted an appeal to the Appellate Court for the Third District, where the judgment below was affirmed, the Appellate Court requiring a *remittitur* of \$2000, and appellant prosecutes this appeal.

Under the plea in abatement three witnesses testified for appellant that they were acquainted with both the railroad and railway companies. E. F. Bradford, upon whom the summons was served, testified that he was the general agent in the traffic department for certain territory in Illinois of the railway company; that he had been the agent from about 1887 to December, 1901, of the railroad company, which up to the latter date had operated the railroad upon which the appellee's decedent was alleged to have been injured; that on December 21, 1901, the railroad changed hands, and that from that time to the time of said trial the railway company had operated said railroad; that said latter company, from the date last aforesaid, controlled all trains running on said

road, employed, paid and discharged all employees, and that all remittances of money, as the receipts for business of said railroad, were made to said railway company, and that on October 2, 1903, when the summons in this case was served on him, he was not the agent of the railroad company. The witness produced, and there was offered in evidence without objection, a circular letter marked No. 1, dated December 16, 1901, and received by him December 21, 1901, signed by the president of the railway company, notifying the witness, as an agent and employee of the railroad company, that the railway company, as lessee, had taken over and would operate the properties owned and otherwise controlled by the railroad company, and that upon receipt of that letter he proceeded at once to change the stationery, bill-heads, and everything of that kind, by using a stamp and stamping them to read "railway" where the word "railroad" appeared, so as to read "The Chicago, Burlington and Quincy Railway Company," under instructions received so to do from said railway company until new supplies were furnished. The witness further testified that since December 21, 1901, the railroad company had no office in Quincy nor had it any agent there, and that from the date of the receipt of the circular No. 1 he had acted as the agent of the railway company, and not the agent of the railroad company.

Appellant also introduced Alvin C. Anders, the freight agent of the railway company at Quincy, who testified that before the change in the companies he was the freight agent of the railroad company, but that in December, 1901, he received notice of the change of companies, and from that time on acted as the agent of the railway company, and that from that time on, and at the time of the injury complained of, and at the time of bringing the suit in question and service of the summons, the railroad was being operated by the railway company; that he stamped the way-bills and other blanks and stationery in his office in December, 1901, so as to read "railway company" instead of "railroad company,"

and that the railroad company had no agent at Quincy after December, 1901; that he was paid by the railway company and remitted all the money to it. In fact, his testimony was substantially like that of the witness Bradford, and need not be further adverted to.

Alfred S. Ellis, the ticket agent for the railway company at Quincy, testified that he had known the railroad for twenty years, during all of which time he had acted as ticket agent; that he acted for the railroad company up to December, 1901, and for the railway company from that time to the time of giving his testimony. He testified with reference to the notification of change and receiving a stamp to change the tickets by the use of the stamp so as to read "railway company," that from December, 1901, to the time of testifying he was paid by the railway company for his services and made all remittances of money to the railway company, and other details upon the same line, and as fully as did the witness Bradford. All three of the witnesses testified that the railroad company had no agent or office in Quincy at any time after December, 1901, and that the railroad company had an office in Chicago from December, 1901, to the time of testifying, where George B. Harris, the president of the railroad company, had his headquarters and could be found.

Appellant also offered, and there was admitted in evidence over the objection of appellee, what purported to be a certified copy of a lease from the railroad company to the railway company of all the railroad company's lines in the State of Illinois and other States, which purported to run from November 20, 1901, for a period of ninety-nine years, which said supposed copy of the lease was duly certified by T. S. Howland, secretary of the Chicago, Burlington and Quincy Railroad Company, and affixed thereto was the corporate seal of said company.

The only evidence offered by appellee as tending to dispute or contradict the evidence of these witnesses was a folder of the "Burlington Route" bearing date October 4,

1903. It was such a folder as is usually found in stations and hotels, advertising the road, containing a map and list of the stations, officers and time-cards for the various divisions of the road in this and other States. On the margin of the first page of this folder was stamped in very small letters, with red ink, "Chicago, Burlington and Quincy Railroad Company, owner," and in the list of officers as representing the Burlington route was "W. A. Lalor, assistant general passenger agent C. B. & Q. R. R., Chicago, Ill." On page 11 there was a notification in regard to the redemption of tickets, in which it was said that they would be redeemed by presentation at the offices of the "C. B. & Q. R. R., Chicago, and B. & M. R. R., Omaha." On page 19 was a time-card of the Galesburg and Quincy route, which bore the heading "Chicago, Burlington & Quincy R. R." On page 15 appeared the time-cards of the Aurora, Ottawa and Streator division and of other divisions, and was originally headed "C. B. & Q. R. R." Where the letters "R. R." were originally printed were three or four stamps, in red letters, of the words "railway" and "railway company." Appellee proved by witness Bradford that this folder was a regular monthly folder issued by the Chicago, Burlington and Quincy Railway Company, and that the railroad company had nothing to do with it.

At the close of all the evidence counsel for appellant, limiting their appearance for that purpose, moved the court to direct the jury to find a verdict for it, which motion was denied.

Among other instructions given at the request of appellee was the following:

2. "If the jury find, from the evidence herein, that the defendant, the Chicago, Burlington and Quincy Railroad Company, was the owner of and operating a railroad known as the Chicago, Burlington and Quincy railroad for many years immediately before December 21, 1901, and that at about the date last aforesaid the said railroad company, as

lessor, leased its railroad, and the operation thereof, to the Chicago, Burlington and Quincy Railway Company as lessee, and that continuously thereafter to the present time said lessee, by its servants and agents, had the exclusive management and control of said railroad and its operation, then the agents and servants of any such lessee would be the agents and servants of this defendant for the purpose of service of summons in this case."

Appellee assigns as cross-error the admission of the copy of the lease.

JOSEPH N. CARTER, and MATTHEW F. CARROTT, (CHESTER M. DAWES, of counsel,) for appellant:

Where the statute prescribes a mode of service of summons on the defendant in order to bring him into court, that mode must be followed to obtain jurisdiction of the person where he does not voluntarily appear. *Mining Co. v. Schirmer*, 64 Ill. 106; *Coal Co. v. Coal Co.* 111 id. 32.

In suits against a corporation, where the statute designates particular persons or classes of persons on whom the process of summons may be served, the service must be had upon one of such specified persons, else the corporation will not be bound by such service. *Hinman v. Opera Co.* 49 Ill. App. 135; *Mining Co. v. Schirmer*, 64 Ill. 106; 22 Am. & Eng. Ency. of Law, (1st ed.) 116.

It is not sufficient that the person served with summons had been the agent of the defendant corporation, but he must have been such agent at the time of the service of the writ in order to bind the corporation. *Stock Exchange v. Keyes*, 67 Ill. App. 461; *Combs v. Oil Co.* 58 Ill. App. 123; *Winney v. Sandwich Manf. Co.* 86 Iowa, 608.

Nor is service on an agent of an agent sufficient. *Railroad Co. v. Miller*, 87 Ill. 45.

There being no evidence fairly tending to prove that Bradford, at the time of service of the summons, was an agent of the appellant company, the trial court should have

directed a verdict for the defendant and should have given the instruction to that effect, as requested by the defendant. *Rack v. Railway Co.* 173 Ill. 289; *Railroad Co. v. O'Conner*, 115 id. 254; *Fraser v. Howe*, 106 id. 563; *Woodman v. Bank*, 211 id. 578; *Bartelott v. Bank*, 119 id. 259; *Railway Co. v. Meirner*, 160 id. 320.

VANDEVENTER & WOODS, for appellee:

The controverted questions of fact as to whether there was a lease from the appellant to the Chicago, Burlington and Quincy Railway Company and whether the process was served upon an agent of appellant, are and have been conclusively settled against the appellant and cannot be re-opened or questioned in this court. *Darlington v. Chamberlin*, 120 Ill. 585; *LaSalle County v. Milligan*, 143 id. 324; *Railway Co. v. Mead*, 206 id. 175; *Casner v. Preston*, 109 id. 531; *Cramer v. Burkhalter*, 207 id. 34; *Paper Co. v. Bank*, 129 id. 296; *Railroad Co. v. Flaherty*, 202 id. 151; *Thompson v. Duff*, 119 id. 226; *Powell v. McCord*, 121 id. 330.

Where an issue of fact on a plea in abatement is made by a corporation denying the agency of the person served with process, as in this case, and such issue is submitted to a jury, the effect is that the defendant admits the merits of the plaintiff's demand, and if that issue of fact in abatement is decided for the plaintiff, the jury, by the same verdict, should assess the plaintiff's damages; and hence it was proper to allow plaintiff in this case to submit to the jury the evidence necessary to enable them to assess such damages if they found the issue in abatement for the plaintiff. *Agricultural Colony v. Pease*, 194 Ill. 100; *Shoe Co. v. Lewis & Co.* 191 id. 155.

The public may look for indemnity for injuries resulting from the wrongful or unlawful operation of the road to that corporation to which they have granted the franchise and thus delegated a portion of the public service; and for this purpose the company whom it permits to use its tracks, and its servants and employees, will be regarded as the servants

and agents of the owner company. *Railway Co. v. Hart*, 209 Ill. 420; *Pennsylvania Co. v. Ellett*, 132 id. 660; *Railroad Co. v. Mayes*, 49 Ga. 355; *Singleton v. Railroad Co.* 70 id. 464.

The circuit court committed a fatal error in admitting the copy of a pretended lease in evidence from the appellant to the Chicago, Burlington and Quincy Railway Company over and against the objection of the appellee, without accounting or attempting to account for the non-production of the original. *Coal Co. v. Moran*, 210 Ill. 9.

A lease is a contract between private parties. Taylor on Landlord and Tenant, (6th ed.) sec. 14; 1 Washburn on Real Prop. (2d ed.) sec. 3, p. 287; 4 Kent's Com. (9th ed.) p. 95.

There being no legal evidence in the case or record showing the Chicago, Burlington and Quincy Railway Company to be the lessee of appellant, its employees and servants, in operating the railroad, became and were the agents and servants of the appellant, the Chicago, Burlington and Quincy Railroad Company. *Hays v. Railroad Co.* 61 Ill. 422; *Railroad Co. v. Black*, 79 id. 262; *Railway Co. v. Hart*, 209 id. 420; 23 Am. & Eng. Ency. of Law, (2d ed.) 777, 778.

Mr. JUSTICE RICKS delivered the opinion of the court:

Many errors are assigned by appellant and argued by its counsel, but as we view the case it is unnecessary for a proper disposition of it to consider but two matters urged by the appellant. The controlling and important questions, as we think, arise from the refusal of the court to give the peremptory instruction directing a verdict for appellant, and the giving by the court of instruction No. 2 given at the request of appellee. Preliminary to the consideration of these questions we should, perhaps, consider the cross-error assigned by appellee upon the admission by the trial court of the certified copy of the lease from appellant to the railway company.

Appellee states that the admission of this evidence was error, and cites and relies upon *Chicago, Wilmington and Vermilion Coal Co. v. Moran*, 210 Ill. 9. We have examined that case and find that it contains a construction of section 18 of the statute in regard to evidence and depositions. (Hurd's Stat. 1903, p. 937.) Section 14 of that chapter relates to the admission of papers and records, etc., of cities and villages. Section 16 is as to the form of the certificate. Section 17 relates to the manner of certifying the records of justices of the peace, and section 18, which was considered in the case cited, reads: "Any such papers, entries, records and ordinances may be proved by copies examined and sworn to by credible witnesses." The language of section 16 is peculiar, and states that the certificate of the clerk of a court or village, city or town, shall certify that he is the keeper thereof, and if there is no seal shall so state. All the sections of that act from 10 to 18, inclusive, except section 15, which will be hereafter noticed, were part of an act appearing in the revision of 1845, and when the language of section 16 is considered, that "if there is no seal" the clerk "shall so state," the meaning and purpose of section 16 are made quite apparent. Section 15 was not passed until 1853, and was no part of the act at the time that sections 16 and 18 were passed. Section 15 reads: "The papers, entries and records of any corporation or incorporated association may be proved by a copy thereof, certified under the hand of the secretary, clerk, cashier or other keeper of the same. If the corporation or incorporated association has a seal the same shall be affixed to such certificate." This section was doubtless placed by the revisers or editors of the statutes as section 15 of the act for the purpose of giving effect to section 18 in a case where the corporation had no seal. The language of section 15 is clear, unambiguous and direct, and if effect is to be given to it, the only inquiry that can arise under it is as to what is meant by the language "the papers, entries and records" of such corporation or association.

No reason has been suggested why section 15 should not be given effect, other than that in the case cited by appellee it is held that a contract between a certain miners' union and a certain coal company was not properly admitted in evidence by merely proving a copy thereof by the testimony of a credible witness. In that case it appears that no proof was made that the corporation or association had no seal, nor was there any certificate to that effect, as required by section 16 of the act. We think the case relied upon has no application to the question before us, as in the case at bar the copy is certified by the proper officer, and in compliance with the statute the seal of the corporation is affixed to the certificate. This section of the statute was considered by this court in *Mandel v. Swan Land Co.* 154 Ill. 177, and it was there held that by virtue of it the papers, etc., that were admissible under its provisions are original and not secondary evidence.

It remains, then, to determine whether the lease is such a paper as is contemplated by the language of said section 15. Whether that section applies to all papers, such as contracts between a company and its employees, or for materials, or other ordinary matters between it and third persons, need not be and is not now considered or decided.

The lease in question is a most important paper in the business of the appellant corporation. It evidences the leasing by it to the railway company of over five thousand miles of railroad, traversing a number of States, with the stations, yards, side-tracks, shops, equipment of engines, cars, machinery, tools, furniture and franchises, except its franchise to be a corporation, for a period of practically a century. That the preservation of such an instrument is of first importance to appellant can be neither doubted nor questioned. The courts must also take knowledge of the fact that under the laws of this State appellant, as lessor, does not escape the risk of frequent litigation arising from the operation of the road by its lessee, and that it would be most

hazardous if it were possible that the original instrument be produced at each trial and introduced in evidence, and held by the court or some competent officer until a record should be made, and perhaps by order of the court certified to courts of appeal. We cannot be unmindful of the fact that there may be a number of suits pending against appellant and for hearing at the same time in different courts, in which case it would be practically impossible, if not totally so, to have the same instrument in various courts at the same time and to be used as evidence. These considerations doubtless appealed to the legislature in enacting the law, and as no reason has been suggested and none suggests itself to our minds why the statute in question may not and should not be given full effect, we are disposed to give it effect, and to hold that the lease in question is such an instrument as is contemplated by the provision of the statute, and that the court did not err in the admission of the copy so certified as evidence.

Appellee urges that this evidence is incompetent and that this court should so hold, and that if it does so hold there is no competent evidence in the record to support the plea in abatement, as it is said by appellee that the only legal evidence of the leasing of the railroad by appellant to the railway company is a written lease, and that no such lease was in evidence. If the question were as to the contents of the lease or its provisions, and as between the parties to it, the position taken by appellee would certainly be sound. But such is not the situation, as we view it. The terms and conditions of the lease were not material or controlling. The fact that the railroad was being operated, at the time of the injury complained of, by a railroad company other than the appellant was the material question that arose under that plea, and it would seem clear that anybody having knowledge and who was familiar with the railroad corporations, and who knew that up to a given time one of them operated the road and after that time the other operated it, could testify, and the evidence would be competent and material. Three

witnesses did testify, and they show by their testimony that they had absolute knowledge, as they were employees originally of the appellant company and from 1901 were employees of the railway company, and their business and duties were of such a character and their relation to the two companies such that they could not be mistaken upon the fact as to who was actually operating the railroad.

Appellee strenuously insists that the questions of fact as to what company was operating the railroad at the time of the injury is foreclosed by the finding of the jury and the judgment of the Appellate Court. Under the request to direct the jury to find a verdict for appellant a question of law, and not a question of fact, arose, and that question of law is preserved and open to our consideration. If there is evidence in the record which, taken as true, together with all the reasonable legal inferences that may arise therefrom, tends to support the position of appellee that the railroad was being operated by appellant and not by the railway company, or if, under the law, although the railway company may have been operating the railroad, service upon the agent of the railway company was legal service as to the railroad company, then the trial court was warranted in refusing the instructions as asked, otherwise not. As is pointed out in the statement of the case, the only evidence tending to show that the railroad company was operating the railroad at the time of the injury was the folder offered by appellee; but in offering that evidence appellee inquired of the witness Bradford, and elicited from him the statement that that circular or folder was issued by the railway company and not by the railroad company. Furthermore, it is not shown that the railroad company had at any time such a stamp as that which was impressed on the first page of the folder, or that it was placed there by any person in authority of the railroad company. In the absence of such proof, and with the proof called forth by appellee clearly showing that the folder was not a folder issued by appellant but by the railway com-

pany, it, with any inference that could be drawn from it, amounted to a mere scintilla of evidence at the very most. It went to the jury and to the court absolutely discredited and absolutely shown not to be the document or act of appellant, but that of another company not a party to the suit. It did not amount to any legal evidence, or was not such evidence as comes within the requirement that it shall be such evidence as, with all the reasonable inferences that shall be drawn from it, fairly tends to support the contention of the party relying upon it, so that unless service upon the servants of the railway company can be held to be service upon appellant the instruction should have been given.

Since 1855 the statute of this State has permitted railroad companies organized under the laws of this State to lease their railroads to corporations organized in this and other States. (Hurd's Stat. 1903, chap. 114, par. 44.) But, following what seemed to this court to be a sound doctrine, we have uniformly held that a railway company cannot absolve itself from the performance of duties imposed upon it by its charter or any general law of the State, or relieve itself from liability for the wrongful acts or omission of duties of persons operating its road, by transferring its corporate powers to other parties or by leasing its road to them; and so we held in *Balsley v. St. Louis, Alton and Terre Haute Railroad Co.* 119 Ill. 68, that the lessor company was liable for the destruction of property by fire caused by neglect upon the part of the lessee company to keep its track and right of way clear and free from dead grass and dry weeds, etc.; and in *Pennsylvania Co. v. Ellett*, 132 Ill. 654, it was held that the lessor company was liable for the death of one caused by the negligence of the operating company. It is there said (p. 659): "The law has become settled in this State by an unbroken line of decisions, that the grant of a franchise giving the right to build, own and operate a railway, carries with it the duty to so use the property and manage and control the railroad as to do no unnecessary

damage to the person or property of others, and where injury results from the negligent or unlawful operation of a railroad, whether by the corporation to which the franchise is granted or by another corporation, or by individuals whom the owner authorizes or permits to use its tracks, the company owning the railway and franchise will be liable." In the more recent case of *Chicago and Grand Trunk Railway Co. v. Hart*, 209 Ill. 414, we held that the lessor company was liable to the servants of the lessee company for injuries received by the breaking of a worn or defective axle or journal on a switch engine upon which such servant was employed. Among other things it is there said (p. 417): "While the duty which rests upon the lessor companies to operate their roads is an obligation which they owe to the public, the permission given by the legislature, as the representative of the public, to perform that duty through lessees has no effect to absolve such companies from the duty of seeing that the lessee company provides and maintains safe engines and cars, and that the employees of the lessee companies to whom is entrusted the operation of their roads are competent and that they perform the duties devolving upon them with ordinary care and skill, for upon the character and condition of safety of such engines and cars and on the competency and care of such employees depend the lives and property of the general public. As a matter of public policy such lessor companies are to be charged with the duty of seeing that the operation of the road is committed to competent and careful hands." The doctrine that a railroad company cannot escape liability for injuries resulting from negligence by leasing their roads or permitting other companies or persons to operate the same is neither new nor modern, but was early announced in *Leshner v. Wabash Navigation Co.* 14 Ill. 85.

The cases above cited, and many more announcing the same principle, are cited by appellee, and his insistence is, as we understand it, that inasmuch as the law is that the lessor

company is liable for the negligence of the lessee company, therefore the lessee company is, in law, the agent and servant of the lessor company, and being such agent or servant, service upon the lessee company is a compliance with the law in regard to the service of process in such cases; and if we understand counsel for appellee correctly, their contention goes further, and to the extent that the agent and servants of the lessee company are the agents and servants of the lessor company as to the public and third parties. As applied to the question of liability for negligence, and confined exclusively to that question, it is doubtless true that this court has gone so far as to say that the public and third persons may look to the corporation to which a franchise has been granted, and that for that purpose a company which such original company permits to use its tracks, and likewise the servants and employees of such lessee company, will be regarded as the servants and agents of the owner. The doctrine of agency and liability has not been carried beyond that class of actions arising from the negligence or willful failure to perform a duty springing from the chartered powers and owing to the public. It has not gone to the extent of liabilities arising from contracts, or even the torts of the lessee company, if they are not made or committed in the discharge of and in connection with the public duty arising from an obligation springing from the chartered privileges or chartered powers of said company. (*Anderson v. West Chicago Street Railroad Co.* 200 Ill. 329.) The fact that the lessee company and its servants and agents may, as a matter of public policy, be held the servants and agents of the lessor company in actions for negligence arising in the exercise of the chartered powers of the lessor company, does not also require or authorize the holding that such servants and agents, for the purpose of liability, shall also be held as the servants and agents of the lessor company for other purposes. It would hardly be contended that if the lessee company makes purchases of sup-

plies, machinery, rolling stock, or the many other things necessary in the operation of a railroad, the lessor would be liable therefor upon any principle of agency or upon the principle of agency declared in the cases above cited and quoted from. Nor would the lessor company be liable in an action of tort, in replevin or trover for the unlawful taking or holding of property by the lessee company or its agents. The question of liability of the principal for acts that it cannot delegate to others is a question wholly distinct from the question of agency. The statute regulating the practice and procedure in courts of record provides that "an incorporated company may be served with process by leaving a copy thereof with its president, if he can be found in the county in which the suit is brought; if he shall not be found in the county, then by leaving a copy of the process with any clerk, secretary, superintendent, general agent, cashier, principal, director, engineer, conductor station agent or any agent of said company found in the county, and in case the proper officer shall make return upon such process that he cannot in his county find any clerk, secretary, superintendent, general agent, cashier, principal, director, engineer, conductor, station agent or any other agent of said company then such company may be notified by publication and mail in like manner and with like effect, as is provided in sections twelve (12) and thirteen (13) of an act entitled 'An act to regulate the practice in courts of chancery,' approved March 15, 1872." E. F. Bradford, upon whom service was attempted to be or was made as the supposed agent of appellant, testified, and was supported by two other witnesses, the evidence of each of whom was uncontradicted, that at the time of said service he was not the agent or servant of appellant and had not been since 1901,—almost two years prior to the time of service. He was the agent of the railway company. He was not acting for appellant, was not employed by it, was not paid by it and received no directions from it. It had no control over him. He made no

reports to it and it could not discharge or relieve him from his position. He owed it no duty, and could not, except in a sense of liability for negligence in the discharge of its chartered powers, be regarded in any manner as the agent of appellant. As a servant or agent he would owe a duty to his principal, and if served with process in actions against his principal his duty naturally would be to forward the copy to his principal or advise his principal of the service thereof, and upon his failure to do so his principal would have the remedy to discharge him, while appellant would have no remedy. Bradford owed no such duty to appellant, but was interested in the welfare of the railway company of which he was a servant, and if he consulted the interests of his principal he might well conclude that he subserved them by silence as to such service. The lessor and lessee are alike responsible for the actions of negligence of the servants of the lessee, and if the rule contended for is sound, an action may be brought against both and service had upon the agent of the lessee, who owes no duty to advise the lessor of the bringing of such suit or the service upon him of the process, and whose interest lies with the lessee, and the interests of the latter may be that judgment shall go against the lessor, so that a judgment by default may go against the lessor without any knowledge that it has been sued. Of course, this could make no difference if the person served was in fact the agent or any one of the persons named in the statute upon whom service might be made, as the courts do not inquire into the discharge of the duty of the agent to his principal, as that is a matter between them; and if the service is good, in the absence of an appearance the court will enter a default, and such default will stand whether the principal received notice of the service or not. This and many other situations clearly not contemplated by law could readily arise which should make the process of courts a mere pretense, and for all practical purposes the defendant had as well be served by notice of publication in a

newspaper in some foreign country as to assume a service such as is here contended for. The language of the statute in this provision as to who may be served requires no nicety of construction. It is plain and simple and is to be given its ordinary meaning.

The question has arisen in other courts, and so far as we know there is but a single case in a court of review in all the States that in any reasonable degree sustains appellee's position. That case is *VanDresser v. Oregon Railroad and Navigation Co.* 48 Fed. Rep. 202. It bears little analogy to the case at bar, and if it were in point we would not be disposed to follow it, as it is contrary to the general rules of construction of statutes and the spirit of our law as we interpret it.

By section 1 of the Practice act railroad companies may be sued where the principal office is located or in any county through which the railroad runs, and by section 4 of the act, as we have already pointed out, service may be had in those counties where no agent or clerk or other person authorized by the statute to be served in such cases is kept, by publication in the same manner as in suits in chancery. The law, therefore, furnishes a remedy, and though it may not be the most satisfactory or convenient, we are not authorized to enter the field of legislation and add to the statute still a further provision for the benefit of those in the appellee's situation.

We think the service was not a valid or legal one, that the peremptory instruction directing a verdict for appellant should have been given, and that the court erred in giving the second instruction given at the request of appellee. The judgment is therefore reversed and the cause is remanded to the circuit court of Adams county for further proceedings in conformity with this opinion. *Reversed and remanded.*

Mr. JUSTICE MAGRUDER, dissenting.

IN THE MATTER OF PROBATE OF WILL OF ANNA L. BARRY.

Opinion filed December 20, 1905—Rehearing denied Feb. 20, 1906.

1. *WILLS*—*proponents not limited in circuit court to testimony of subscribing witnesses.* On appeal to the circuit court from an order of the county court denying probate the proponents are not limited to the testimony of the subscribing witnesses.

2. *SAME*—*affidavits of subscribing witnesses in county court may be proven by proponents to contradict their testimony.* Proponents of a will are required by law to produce the subscribing witnesses in the circuit court, if alive and sane and within the jurisdiction of the court, and hence may prove the affidavits of such witnesses made in the county court, for the purpose of contradicting their testimony as given in the circuit court, where there is conflict.

3. *SAME*—*what is not essential to valid attestation.* It is not necessary for a testatrix to state or for the subscribing witnesses to know that the instrument which they attested was her will nor for her to acknowledge to them that she had signed it, it being sufficient if she acknowledged to them, either by words or acts, that the instrument was her act and deed.

4. *SAME*—*what necessary to cast burden of proving absence of fraud upon one standing in confidential relation.* In order to cast upon one standing in confidential relationship to the testatrix the burden of proving the absence of fraud or undue influence in making the will, such person must be shown to have been directly connected in some manner with the making of the will, and it is not enough to show that he was present in the house when the will was executed.

APPEAL from the Circuit Court of Brown county; the Hon. A. AKERS, Judge, presiding.

JEFFERSON ORR, MATTHEWS & ANDERSON, J. F. REGAN, and LEON ORR, for appellants.

R. E. VANDEVENTER, and VANDEVENTER & WOODS, for appellee.

Per CURIAM: The county court of Brown county refused to probate the instrument in controversy as the last will and testament of Anna L. Barry, and an appeal was taken to the circuit court of that county from the order

of the county court denying the petition for probate. The law is well settled that upon the trial in the circuit court of an appeal from an order of the county court refusing to probate a will, the proponents may prove the execution of the will and the sanity of the testator by any evidence competent to establish a will in chancery, and that while they are required to produce the subscribing witnesses, if alive and sane and within the jurisdiction of the court, they are not limited to or necessarily bound by the testimony of the subscribing witnesses. *Webster v. Yorty*, 194 Ill. 408; *Illinois Masonic Orphans' Home v. Gracy*, 190 id. 95; *Thompson v. Owen*, 174 id. 229; *Crowley v. Crowley*, 80 id. 469.

The only question relating to the formal execution of the will in controversy between the parties is whether or not the subscribing witnesses saw the testatrix sign the will at the time of its execution, or, if they did not, whether or not she acknowledged the same to them to be her act and deed at the time when they signed as attesting witnesses.

At the time when the will was executed there were present in the library of the home of the testatrix, the two subscribing witnesses, DeWitt and Test, the testatrix herself, and William Mumford, the husband of the only daughter of the testatrix and the father of her grandson, Barry Mumford, who is her principal devisee. In certain contingencies William Mumford would take part of the property under the will, and he was not a competent witness and did not testify as to what occurred when the will was executed. The evidence shows he took no part in what was said and done in the library while the subscribing witnesses were present.

The evidence shows that the will was typewritten, but that certain words therein were written with a pen in the handwriting of the testatrix. In the clause of the will providing that if Barry Mumford should die during the lifetime of the testatrix the devises made for his benefit should go to his parents "in the following proportions, that is to say," the testatrix wrote with a pen the words "and Nellie

Price" after the word "parents," and the words "one-third to each" after the words "that is to say." There was a full attestation clause at the end of the will after the signature of the testatrix, such attestation clause being dated October 6, 1903, and reciting fully those facts necessary to constitute the valid execution of a will, and showing that the will was signed by the testatrix in the presence of the subscribing witnesses and acknowledged by her to them to be her last will and testament. Below the attestation clause is the word "witnesses" on the left side of the page, and the word "residence" on the right side of the page, and underneath appear the names of the subscribing witnesses, M. L. DeWitt and Ellsworth E. Test, opposite the name of the latter being his residence, "Mt. Sterling, Brown Co., Ill."

M. L. DeWitt, one of the subscribing witnesses, testified that in the early part of October, 1903 he called at the home of the testatrix to deliver some milk and butter, and that Cora Scherrer, a domestic in the home of the testatrix, called him into the house, and that he went into the library where the testatrix was, the other subscribing witness, Ellsworth Test, coming in soon afterward; that the testatrix was sitting at the desk writing on this paper, (meaning the will,) and after Test had come in said that she wanted "us fellows" to sign some papers for her; that he, the witness, was sitting some four or five feet from the desk, and that she asked him to sign that, whereupon Test said something about his father telling him to be careful about signing papers, and she said it was some of her own affairs; that she was writing on the paper she asked the witness to sign, and that he signed that paper, at her request, below the word "witness;" that he saw the word "witness" when he signed his name, and saw the name of the testatrix, Anna L. Barry, when he signed his name, and that the testatrix was of sound mind at the time when all this was done. This witness, on being asked to state how the paper was folded when he signed the same as a witness, folded the paper so as to

cover the attestation clause and the signature of testatrix, leaving the word "witness" visible, and thus exhibited the paper to the court. The witness DeWitt was living on the farm of testatrix as a tenant at this time, and occasionally called at the home of the testatrix on business connected with the farm.

Test, the other subscribing witness, was a young man rooming at the home of the testatrix and choring about the house and barn a great part of the time. This witness stated that he felt an interest in the proceeding that the will should not be probated; that he had no pecuniary interest in the matter, but that he thought the estate should be equally divided, affirming, however, that this feeling would not affect his testimony. He admits that soon after the will was offered for probate he left the home of the testatrix, feeling that it was not his place to remain there any longer, but declined to say that he and Mrs. Mumford, the daughter of the testatrix, had no unkind words at parting.

The subscribing witness Test swore on the trial that on the occasion in question Cora Scherrer called him, saying that Mrs. Barry wished him to witness some papers for her, and that he went into the library where she was, and found the witness DeWitt sitting there, and William Mumford in the room still farther away; that Mrs. Barry was at the desk, supposed to be writing, and that she got up from the desk and asked DeWitt and himself to sign some papers for her, and that they did so; that she told him to put his address after his name, and that he complied with this request: that he saw the words "witness" and "residence" on the paper when he signed his name; that he did not see the testatrix write a single letter when at the desk, but that she had a pen in her hand, and the instrument in question was lying on the desk just before she asked the witness to sign it; that the testatrix was of sound mind at the time; that after DeWitt and himself had signed their names he made the remark, in a joking way, that they would have to watch

the lawyers or they might get them to sign something they ought not to sign, and that she said it was a private matter of her own; that he did not see the name of the testatrix, and that he thinks the paper was folded so that he could not see her name.

Both of the subscribing witnesses state that they did not read the attestation clause or hear it read. Both of them identified the instrument in question as the one signed by them on the occasion to which they testified. There was an abundance of evidence, aside from the testimony of these two witnesses, that the signature of the testatrix is her genuine signature, and this point is not controverted.

The evidence also shows that the testatrix had made a will on a former occasion and must have known the requisites to the proper execution of a will; that she was a strong-minded woman; that on the same day on which the will was made she wrote an instrument and signed the same, calling it a codicil to her will that day made, and that a year afterwards, and about three days before she died, she told the witness Mrs. Stubblefield that she had made a will, and gave her the substance of the provisions of the instrument in question and the reason why she had left nothing whatever to her granddaughter, Nellie Barry.

The affidavits of the subscribing witnesses, filed in the county court, were admitted in evidence, and it appears from these affidavits that each of the subscribing witnesses swore in the county court that before he signed as a witness he saw the testatrix writing on the instrument in question, and that he subscribed his name to the will as one of the subscribing witnesses at the request of the testatrix, and in her presence and in the presence of the other subscribing witness. The proponents were compelled to call the subscribing witnesses to the witness stand, for which reason the affidavits made by them in the county court were proper evidence for the purpose of contradicting their testimony. *Thompson v. Owen, supra.*

Even if the subscribing witnesses did not actually see the testatrix sign the will, the evidence shows quite conclusively that she did at least acknowledge the same to them to be her act and deed, and that they thereupon, at her request, signed the same as subscribing witnesses. In *Gould v. Chicago Theological Seminary*, 189 Ill. 282, it is said (p. 292): "It is not necessary that the attesting witnesses see the signature of the testator upon the face of the will, that they know the instrument they are witnessing to be a will, or that an acknowledgment of the signature be made to them by the testator. The statutory requirement is satisfied if the testator acknowledge the execution of the will. And such acknowledgment need not be in language. Any act, sign or gesture of the testator will suffice which indicates an acknowledgment of the will with unmistakable certainty." Nor is it necessary that in the acknowledgment of the instrument it should be called a will or that the subscribing witnesses should know that the instrument is a will. (*Webster v. Yorty, supra.*) Neither is it necessary that there should be an attestation clause, but it is sufficient if the witnesses sign as attesting witnesses in the manner and under the circumstances required by the statute. And so it was not necessary for Anna L. Barry to state, or for the subscribing witnesses to know, that the instrument in question was her will, nor was it necessary for her to acknowledge to them that she had signed it, but it was sufficient if she acknowledged to those witnesses, either by words or acts, that the instrument in question was her act and deed. *Illinois Masonic Orphans' Home v. Gracy, supra.*

The testatrix had made a will before, which had been executed as required by law. The instrument in controversy had been typewritten, and she had made changes in it in her own handwriting, showing that she had given the matter careful consideration. Attached to the instrument was an attestation clause, reciting that the witnesses saw her sign the will and that she acknowledged the same to be her last

will and testament, and setting forth all the other formalities required by statute in the execution of a will. Presumably she had read the attestation clause, and knew that the word "witnesses" was at the bottom of the clause. She instructed the domestic to tell DeWitt and Test to come into the room, telling her to tell Test that she wanted him to sign a paper. After writing on this instrument, or, at least, having her pen in hand with the instrument lying before her on the desk, she told the witnesses that she wanted them to sign some papers for her, asking one of them to write his residence after his name. She got up from the desk, and the witnesses signed their names under the word "witnesses," and Test wrote his residence after his name. Either before or after the witnesses signed something was said about being careful as to signing papers, or about watching that the lawyers did not get them to sign something they ought not to sign, and the testatrix answered that it was some of her own affairs, according to one witness, or that it was a private matter of her own, according to the other. What was the meaning of all this? Surely not that the testatrix was having the witnesses sign an obligation to her, or write their names for mere practice in penmanship, or for some other useless purpose. The above facts are reconcilable with one conclusion, and one only, and that is, that the testatrix called for DeWitt and Test to witness her will, and acknowledged the same to them to be her act and deed in full compliance with the requirements of the statute upon that point, whereupon the attesting witnesses signed the attestation clause in the presence of the testatrix and of each other, and at her request.

It is further contended on the part of the contestants that the will in question is the product of undue influence over the testatrix on the part of William Mumford. Evidence was introduced to show that William Mumford made a trip almost every month from his home in Pittsfield to the home of the testatrix in Mt. Sterling for the purpose of transacting her business for her, and that he was her confidential and

professional adviser as well as her son-in-law. There is no evidence in the record, however, to show that William Mumford had anything whatever to do with the preparation or execution of the will in question. He was present in the library when the will was executed, but took no part therein, either by word or act. After the will was executed the testatrix sent it to the bank, sealed up in an envelope with other papers, and there it remained for about a year and until after her death. There is no evidence to show any effort on the part of William Mumford to influence the testatrix to make a will, or to favor his son, Barry, in the disposition of her property. In cases in which the burden of proof is thrown upon one standing in a confidential relationship to show the absence of fraud or undue influence in the making of a will, such person must be shown to have been directly connected in some manner with the making of the will. The record fails to show that William Mumford was connected in any manner with the execution of the will. Any suspicion which might be engendered by Mumford's presence in the library when the will was executed cannot be regarded as proof of any such alleged fact. On the contrary, the declarations of the testatrix are in evidence to the effect that William Mumford did not write the will and that he had nothing to do with it.

When the will was made the testatrix had one living child, the wife of William Mumford, and two grandchildren, one of them Barry Mumford, child of William Mumford and wife, and the other, Nellie Barry, child of a deceased son of the testatrix. The bulk of the property disposed of by the will of the testatrix came to her from her husband, who had died on May 8, 1902. Nellie Barry's mother had secured a divorce or separate maintenance from her husband, the son of the testatrix, and Nellie had remained with her mother, though visiting the testatrix occasionally. Nellie's father had gone home to his mother, the testatrix, where he died in January, 1903. The will was made in October fol-

lowing. It is probable that this divorce proceeding, and the feeling engendered by it, had something to do with the act of the testatrix in leaving Nellie out of her will. However that may be, the testatrix had the right to dispose of her property as she saw fit, and there is no sufficient evidence in the record to show that her will was not freely, voluntarily and understandingly made, without the advice or persuasion of any person whomsoever. The charge of undue influence has not been established.

The order of the circuit court is reversed and the cause is remanded to that court with directions to enter an order admitting the will to probate.

Reversed and remanded, with directions.

CHARLES C. LAMB

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Opinion filed December 20, 1905—Rehearing denied Feb. 20, 1906.

1. NAMES—*there is no variance between names "Davey" and "David."* There is no variance between the name "Davey S. Pate," appearing in the record of a criminal case as having been appointed foreman of the grand jury, and the name "David S. Pate," endorsed on the indictment as foreman of the grand jury.

2. CRIMINAL LAW—*record need not show the "organization of the court."* The record of a criminal case need not show the names and presence of its various officers, it being sufficient if the fact that the court was actually in session, together with its proceedings, is shown from the record by the certificate of the clerk under his official seal.

3. SAME—*absence of clerk should be shown by bill of exceptions.* If the clerk of the court is not present, by himself or deputy, at the trial of a criminal case, the fact of such absence must be affirmatively shown by the bill of exceptions if the accused desires to avail himself of that fact as being ground for reversal.

4. SAME—*failure to ask the accused if he has anything to say against pronouncing sentence is not ground for reversal.* While the proper practice in a criminal case is to ask the accused if he

has anything to say why he should not be sentenced, yet the failure to do so is not ground for reversal.

5. *SAME—when indictment is sufficiently identified.* If the record of a criminal case shows that the indictment under which the accused was tried was identical in number, title and offense with the one returned by the grand jury, the indictment is sufficiently identified.

6. *SAME—when alleged error cannot be considered.* Alleged error, in that the record fails to show that any officer was sworn to take charge of the jury, or that any officer sworn by the court did take charge of the jury, cannot be considered where those facts are not shown by a bill of exceptions, and it does not appear that the accused objected to the irregularity, if any existed.

WRIT OF ERROR to the Criminal Court of Cook county;
the Hon. FRANK BAKER, Judge, presiding.

Charles C. Lamb, the plaintiff in error, was indicted at the December term, 1899, of the criminal court of Cook county for the crime of murder. Upon a trial he was, by the verdict of a jury, found guilty of that crime, and his punishment was fixed at confinement in the penitentiary for the term of his natural life. After overruling a motion for a new trial and a motion in arrest of judgment, the court pronounced judgment upon the verdict and sentenced the plaintiff in error to confinement and hard labor in the penitentiary at Joliet for the term of his natural life. The plaintiff in error has sued out this writ of error to review the record of the criminal court. No bill of exceptions was preserved.

MYER S. EMRICH, for plaintiff in error.

WILLIAM H. STEAD, Attorney General, JOHN J. HEALY, State's Attorney, and F. L. BARNETT, for the People.

Mr. JUSTICE SCOTT delivered the opinion of the court:

First—The record of the empaneling of the grand jury shows that Davey S. Pate was appointed foreman of that body. The indictment returned in open court is endorsed a

true bill by "David S. Pate, foreman of the grand jury," and the record recites that the indictment so endorsed was by the grand jury presented in open court, and it is urged that neither the foreman nor any member of the grand jury endorsed the indictment, so far as appears from the record.

We do not think there is any variance between the names Davey S. Pate and David S. Pate, as "Davey" is a diminutive or nickname for "David." *Kerr v. Swallow*, 33 Ill. 379; *Walter v. State*, 105 Ind. 589.

Second—The *placita* of the court record for the day upon which the motions for new trial and in arrest of judgment were disposed of, shows that the judge of the court, the sheriff of the county and the State's attorney were present. These facts were attested by William C. Lawson, as clerk, as appears from the record of that day, when in fact Patrick J. Cahill was clerk of the court.

In *Yates v. People*, 38 Ill. 527, it was held that it was not necessary that the record should show the "organization of the court," if by that phrase is meant the names and presence of its various officers, and that the only thing that was important was, that it should appear from the transcript that the court was actually in session, and that its proceedings should be shown from its record by the certificate of its clerk under his official seal.

We are of opinion that if Cahill was not present, by himself or deputy, and plaintiff in error desired to avail himself of that fact, such absence should have been made to appear affirmatively by a bill of exceptions.

Third—It is urged that "Lamb had no opportunity to be heard why sentence should not be pronounced upon him, according to the requirements of the common law." The record of the court in this regard reads as follows: "And now neither the said defendant nor his counsel for him saying anything further why the judgment of the court should not now be pronounced against him on the verdict of guilty, heretofore rendered to the indictment of this cause."

In *Gillespie v. People*, 176 Ill. 238, it was said that similar language implied that opportunity was afforded defendant to speak, and that while the proper practice is to ask a defendant if he has anything to say why he should not be sentenced, the omission so to do is not ground for reversal, citing *Gannon v. People*, 127 Ill. 507, and *Harris v. People*, 130 id. 457.

Fourth—It is then said that there is nothing in the record which shows the indictment returned by the grand jury to be the same indictment upon which the prisoner was tried. The record shows that the grand jury returned an indictment for murder in the case of *The People of the State of Illinois vs. Charles C. Lamb*, No. 57231. It is then shown that the accused was tried in the same cause bearing the same number, upon an indictment for murder. We think the indictment upon which he was tried is thereby identified as the one which the record shows was returned in open court by the grand jury charging him with the crime of murder.

Fifth—The remaining assignment of error which is brought to our attention by the brief and argument for Lamb is, that it does not appear from the record that any officer was sworn to take charge of the jury, or that any officer sworn by the court did take charge of the jury when they retired to consider of their verdict, or at other times when they retired from the court room. It is not made to appear that the accused objected to the irregularity, if any occurred at any time when the jury retired, nor is it made to appear by a bill of exceptions that the jury, upon any retirement, was not in charge of a sworn officer. This assignment, therefore, cannot be considered. *Dreyer v. People*, 188 Ill 40.

The judgment of the criminal court of Cook county will be affirmed.

Judgment affirmed.

THE ILLINOIS STEEL COMPANY

v.

THE PREBLE MACHINE WORKS COMPANY.

Opinion filed December 20, 1905—Rehearing denied Feb. 21, 1906.

1. EVIDENCE—*when receiver's inventory is admissible.* In an action by a receiver for damages for breach of a contract to sell a quantity of pig iron to plaintiff's insolvent, if the defendant claims the contract was sold with other assets of the insolvent at the receiver's sale,—the only evidence in support of such claim being the petition, order of sale, report of sale and order of approval,—the receiver's itemized inventory is admissible to show what was included in the term "assets," as used in the order of sale.

2. SAME—*when error in permitting witness to state a conclusion is not harmful.* Permitting the plaintiff in an action for breach of contract to state that the contract was not sold with other assets of his insolvent at the receiver's sale, although a statement of a conclusion, is not prejudicial, where the trial was without a jury.

3. APPEALS AND ERRORS—*when a finding of fact is conclusive.* A finding, as a question of fact from the evidence, by the trial court and the Appellate Court that a certain contract was not sold at a receiver's sale with the other assets of the insolvent, is conclusive upon the Supreme Court if based upon competent evidence.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on writ of error to the Circuit Court of Cook county; the Hon. O. P. THOMPSON, Judge, presiding.

This was a suit in assumpsit, brought in the circuit court of Cook county in the name of the Preble Machine Works Company (hereinafter referred to as the machine company) by James M. Arnold, its receiver, against the Illinois Steel Company, (hereinafter referred to as the steel company,) to recover damages for a breach of contract. The case was tried before the court without a jury, and a judgment was rendered in favor of the machine company for \$3315. The steel company sued out a writ of error from the Appellate Court for the First District, where the judgment of the cir-

cuit court was affirmed, and it now brings the cause to this court by appeal.

The cause of action is the alleged breach of a written contract made on December 31, 1898, between the machine company and the steel company for the delivery to the former by the latter of one thousand tons of pig iron, at a fixed price per ton, during the year 1899, at such times as the machine company should order the same. Four hundred and thirty-seven tons were ordered prior to February 16, 1899. On that date a receiver was appointed for the machine company by the superior court of Cook county. On March 16, 1899, the receiver filed an inventory in court showing the assets of the company which had come to his hands. On the 20th day of the same month he presented a petition to the superior court praying for an order to sell such assets, and on the same day an order was made granting the prayer of the petition. Thereafter the receiver reported to the court that he had made sale of the assets, as directed by the order, to the Union Trust Company, conditioned upon its approval by the court.

Subsequent to these proceedings the receiver presented another petition to the superior court, in which he represented that he had discovered another asset of the machine company, being the contract with the steel company above mentioned, which was not included in his inventory and was not sold with the other assets to the Union Trust Company. This petition prayed for an order to purchase from the steel company the amount of pig iron remaining due under the contract, and for a further order to sell the same at a price which had been offered in advance of the contract price. An order was made granting the prayer of this petition. The receiver ordered the pig iron but the steel company refused to deliver it, claiming that the contract had passed with the sale of the other assets to the Union Trust Company. Thereupon this suit was commenced. The judgment rendered by the circuit court is the difference between the contract price

and the market price of five hundred and sixty-three tons of pig iron on May 31, 1899, the day on which the breach of contract is alleged to have occurred.

On the trial the circuit court, over the objection of the steel company, admitted the receiver's inventory in evidence, and also permitted the receiver to testify that the contract was not included in any item of the inventory and was not sold with the other assets to the Union Trust Company. The admission of this evidence is assigned as error.

KNAPP, HAYNIE & CAMPBELL, for appellant.

GALE BŁOCKI, for appellee.

Mr. JUSTICE SCOTT delivered the opinion of the court:

The defense to this suit, as set up by appellant's plea in the trial court, was that the machine company, through its receiver, had sold the contract in question to the Union Trust Company. The only evidence of such sale produced by appellant upon the trial was the petition, order of sale, report of sale and order approving sale. The petition stated that the assets, as shown by the receiver's inventory, amounted to \$23,213.88, of which \$15,086.08 was personal property and \$7184.67 bills receivable, and that such assets could probably be sold at a sum nearly equal to their appraised valuation. The prayer of the petition was for an order to sell such assets. The order, based upon this petition, directed the receiver to sell at public sale, as a whole, the assets of the machine company, including all personal property, book accounts, good will of business and the charter, but provided that he should not conclude the sale unless he should receive for said assets at least three-fourths their appraised value as fixed by the inventory.

Appellee, over the objection of appellant, introduced in evidence the inventory, which set out in detail the articles of personal property, more than two hundred in number,

which make up the \$15,086.08 stated by the petition to be the value of the personal property. The contract is not mentioned among those items and could not have been included in any of them because of their nature. The other items shown are, "cash on hand," \$131.66; "on deposit," \$811.47; and "good accounts uncollected, as taken from the books of the Preble Machine Works Company," \$7184.67.

Appellee also introduced in evidence the testimony of the receiver to the effect that the contract was not included in the item "good accounts uncollected" or in any other item in the inventory, and was not sold with the other assets to the Union Trust Company.

Upon this evidence both the circuit court and the Appellate Court for the First District found the issue made by the pleadings, viz., was the contract sold to the Union Trust Company with the other assets?—in favor of the appellee, and the finding of that court on that question of fact, based upon the evidence before it, is conclusive here. *Alphin v. Working*, 132 Ill. 484; *New York Life Ins. Co. v. People*, 195 id. 430.

The only question that can be considered by this court is whether the finding of fact is based on incompetent evidence.

Appellant urges that the inventory should not have been received in evidence to explain what was included within the term "assets" as used in the order of sale, because that term has a definite meaning, and an order or judgment of a court having jurisdiction to render the same cannot be impeached by extraneous evidence. We do not think that the inventory can be considered as varying or contradicting the terms of the order. The filing of the inventory and petition and the making of the order were all successive steps taken in one proceeding pending in the superior court for the management of the affairs of the machine company through an officer of that court. Each step was dependent upon the preceding one. It is therefore but logical that the petition for sale of the assets should have reference only to

the assets as listed by the receiver in his inventory, and that the order should apply to such assets only. Both the order and petition on which it is based show on their face that the assets referred to are those named in the inventory. The petition refers to the assets as amounting to a certain sum as shown by the inventory, and the order directs a sale of such assets provided they shall bring at least three-fourths their appraised value as fixed by the inventory. It is as manifest that the word "assets," as used in the petition and order, refers to the assets mentioned in the inventory, as though the items listed in the inventory had been specifically set out in the petition and order.

We are therefore of opinion that the inventory was properly received in evidence to show what was included in the term "assets," as used in the order of sale.

The testimony of the receiver to the effect that the contract was not included in the term "good accounts," or any other item of the inventory, is also said to have been incompetent. That testimony had reference merely to what was conclusively apparent from an inspection of the inventory, namely, that the contract was not included in any item of that instrument. It therefore was no additional aid to appellee's contention that the contract was not sold, and its admission, if error, was not prejudicial.

Although the conclusion stated by the witness that the contract was not sold with the other assets to the Union Trust Company was improper to be given in evidence, yet we think that its admission was harmless error in view of the fact that the trial was before the court without a jury, and that such statement could not have affected the judgment.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

THE CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY
v.

THE PEOPLE *ex rel.* O. L. McCord, County Treasurer.

Opinion filed December 20, 1905—Rehearing denied Feb. 20, 1906.

1. TAXES—*when a tax levy cannot be validated—res judicata.* A judgment by the Supreme Court holding a particular tax levy to be invalid is a final adjudication that the tax is invalid, and the legislature has no power to thereafter validate the levy and thereby make the tax collectible, even though the act is passed before the remanding order is filed in the lower court.

2. RES JUDICATA—*when lower court can only enter final judgment without re-trial.* Where the Supreme Court decides that a tax levy is invalid, which is the only issue in the case, the lower court, upon reversal and remandment, has no power except to enter a final judgment without re-trial, even though the Supreme Court gave no specific direction to that effect.

WILKIN and HAND, JJ., dissenting.

APPEAL from the County Court of Vermilion county;
the Hon. S. MURRAY CLARK, Judge, presiding.

H. M. STEELY, (W. H. LYFORD, and E. H. SENEFF, of counsel,) for appellant.

J. W. KEESLAR, State's Attorney, (W. T. GUNN, and SWALLOW & SWALLOW, of counsel,) for appellee:

A judgment of the Supreme Court reversing and remanding a case to the lower court leaves the case precisely as if no trial had occurred or judgment had been rendered. *Chickering v. Failes*, 29 Ill. 294; *Mohler v. Wiltberger*, 74 id. 163; *Cable v. Ellis*, 120 id. 136.

It is within the power of the legislature, by the enactment of retrospective statutes, to cure defects in legal proceedings. Of this class are statutes which cure irregularities in the assessment of property for taxation and the levy of taxes, etc. *Town of Fox v. Town of Kendall*, 97 Ill. 72; *Fairfield v. People*, 94 id. 244; Cooley's Const. Lim. (7th ed.) 531.

Mr. JUSTICE SCOTT delivered the opinion of the court:

This is an appeal from a judgment of the county court of Vermilion county sustaining a tax which had been levied "for county purposes" by the board of supervisors of said county at the September meeting, 1903, thereof, and which had been extended against appellant's property in that county. The application for judgment was made by the county treasurer at the June term, 1904, of the county court. Among other objections, the appellant filed one attacking the tax on the ground that the board of supervisors did not state separately the amount of tax required for each county purpose. This objection was overruled and judgment was rendered against appellant's property for the amount of the tax, together with the interest, penalty and costs due thereon. Appellant appealed to this court, where the judgment was, at the December term, 1904, reversed and the cause remanded. (*Chicago and Eastern Illinois Railroad Co. v. People*, 213 Ill. 497.) The cause was re-docketed in the county court, and at the May term, 1905, thereof the court heard the case on the original application and objections and again overruled the objection above referred to, and entered judgment against appellant's property for the tax, etc. Appellant prosecutes this appeal from that judgment.

After the case had been reversed by this court but before the remanding order had been filed in the county court, the legislature of this State passed the following act, entitled "An act to make legal and valid the acts of the county board heretofore done in determining the amounts of all taxes to be raised for county purposes in their respective counties, and to make legal and valid the levy of taxes for county purposes thereunder:"

"Section 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That when the county board of any county heretofore in determining the amounts of all taxes to be raised for county purposes in

any year, has at its September session in such year determined said amounts by naming a fixed and definite sum to be so raised without naming the particular or specific purposes for which said taxes, when collected, shall be appropriated, expended or raised, and when any county board heretofore in determining the amounts of all taxes to be raised for county purposes in any year, has at its September session in such year declared or provided that a certain number of cents on each \$100 of valuation of property shall be raised for county purposes, not exceeding seventy-five cents, on each \$100 of such valuation and without naming the particular or specific purposes for which said taxes when collected shall be appropriated, expended or raised, and when any county board heretofore in determining the amounts of all taxes to be raised for county purposes in any year, has at its September session in such year, declared or provided that a certain number of cents on each \$100 of valuation of property shall be raised for county purposes not exceeding seventy-five cents on the \$100 of valuation of property and has named the particular or specific purposes for which such taxes when collected shall be appropriated, expended or raised, such determination and the taxes assessed, levied or extended, shall be and are hereby declared to be legal and valid, anything in any law of this State to the contrary notwithstanding.

"Sec. 2. Whereas, an emergency exists, therefore this act shall take effect and be in force from and after its passage."

This act was approved February 28, 1905. (Session Laws of 1905, p. 359.)

Appellant insists that upon the filing of the remanding order of this court in the county court the latter court had no alternative but to sustain the objection to the tax, because the tax had been declared and adjudged by this court to be illegal and invalid, and further insists that no act of the legislature could thereafter affect such determination and adjudication.

On the part of the appellee it is contended that the act of the legislature above set out validated the levy made by the board of supervisors at its September meeting, 1903, and removed the objection to the tax which this court had held was well taken; and this was the view taken by the county court on the hearing there.

The judgment rendered by this court when this cause was first here was a final adjudication that the tax in question was invalid. The legislature could not thereafter validate this levy and thereby make the tax collectible. Cooley's Const. Lim. (7th ed.) 136-139; *Dobbins v. First Nat. Bank*, 112 Ill. 553.

The only question presented on the earlier appeal was as to the validity of the levy. This court determined that such levy was not made in accordance with the law. That was a final determination of that question, and although the order reversing and remanding the cause did not specifically direct the court below to enter a judgment sustaining the objection, still there was no power in that court, upon the case being re-docketed there, except to enter such a final order or judgment without a re-trial, for the reason that this court had determined the only issue involved upon its merits. *In re Estate of Maher*, 210 Ill. 160; *Wenham v. International Packing Co.* 213 id. 397; *Clayton v. Feig*, 188 id. 603.

The judgment of the county court will be reversed, and the cause will be remanded to that court with directions to enter an order sustaining the objections to the tax.

Reversed and remanded, with directions.

Mr. JUSTICE WILKIN, dissenting:

I think this opinion is in conflict with the previous decisions of the court. The former judgment of the county court was reversed and the cause remanded to that court without any directions whatever, and that left it, when reinstated, in precisely the same condition as though there had been no trial or judgment. "A judgment reversing the

judgment or decree of the trial court, expressed in general terms, without specific direction or instruction, operates to completely annul the judgment or decree of the lower court and to restore the parties to the position they occupied when the original decree or judgment was rendered. Its effect is substantially the same as that of a judgment awarding a new trial, for, in general, it opens up the whole case." (Elliott on Appellate Procedure, sec. 580, and cases cited.) Many decisions of this court are to the same effect. We did not hold in the former case that the county tax was not authorized by law, but simply that it was not levied in conformity with the requirements of section 121 of the Revenue act, as it then existed. The curative act of 1905 was passed expressly for the purpose of curing defects in that levy. The latter act has been sustained by this court in *People ex rel. v. Wisconsin Central Railroad Co.* (*ante*, p. 94,) and we there held in conformity with the rule announced in Cooley's Constitutional Limitations, (7th ed.) 531, which is: "If the thing wanting or which failed to be done, and which constitutes the defect in the proceeding, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute. And if the irregularity consists in doing some act or in the mode or manner of doing some act which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law." The same rule is followed in *Cowgill v. Long*, 15 Ill. 202, and was adopted in *Blake v. People*, 109 Ill. 504, and is recognized in *Fairfield v. People*, 94 id. 244. See, also, *Steger v. Traveling Men's Building Ass.* 208 Ill. 236, and *Fugman v. Jiri Washington Building and Loan Ass.* 209 id. 176.

It is a general rule that the province of an Appellate Court is only to inquire whether a judgment then rendered was erroneous or not. But if, subsequent to the judgment and before the decision of the Appellate Court, a law inter-

venes and positively changes the rule which governs, the law must be obeyed or its obligation is denied. *United States v. Schooner Peggy*, 1 Cranch, 40.

It is not claimed in this case that the tax in question has been paid, and I am unable to see why, upon the re-trial, the curative act of 1905 was not available to the county to enforce its collection. Certainly the case is not distinguishable, upon principle, from that of *Cowgill v. Long*, *supra*, where we held that the legislature has power to pass an act to remedy defects in the law authorizing taxation for building school houses while the tax remains uncollected. It is the well known policy of the law to favor the collection of all legal taxes.

Mr. JUSTICE HAND: I concur in the foregoing views expressed by Mr. JUSTICE WILKIN.

W. J. LUDDY

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Opinion filed December 20, 1905—Rehearing denied Feb. 21, 1906.

1. CONSTABLES—*constable has no right to do illegal acts because he has a writ.* The fact that a man is a constable and has a writ regular on its face does not justify him in doing illegal and unlawful acts under the cloak of such authority.

2. SAME—*when a constable is guilty of larceny.* A constable who, in conspiracy with a justice of the peace and a collection agent, seizes goods on a writ issued on a void judgment for claims which had been paid, as shown by receipts filed with the justice but destroyed by him, taking the goods away in a van on which the name was covered, and afterwards concealing himself to prevent demand for the return of the goods, which were subsequently found, after a pretended sale, where they had been hidden by the justice and constable, is guilty of larceny.

CARTWRIGHT, C. J., and MAGRUDER and BOGGS, JJ., dissenting.

WRIT OF ERROR to the Criminal Court of Cook county;
the Hon. GEORGE A. DUPUY, Judge, presiding.

W. G. ANDERSON, for plaintiff in error.

WILLIAM H. STEAD, Attorney General, and JOHN J. HEALY, State's Attorney, for the People.

Mr. JUSTICE WILKIN delivered the opinion of the court:

At the February term, 1905, of the criminal court of Cook county the grand jury returned an indictment charging the plaintiff in error, W. J. Luddy, with stealing certain goods and chattels, the property of Lucy J. Kimball. Upon a trial before the court and a jury he was found guilty as charged and the value of the property was fixed at \$500. A motion for a new trial was overruled and Luddy was sentenced to imprisonment in the penitentiary at Joliet. To reverse that judgment this writ of error has been prosecuted.

The plaintiff in error, at the time of the alleged theft and at the time of his conviction and sentence, was a duly elected, qualified and acting constable of Cook county. He had an office at room 405, No. 95 Washington street, in Chicago, together with one George Frankenberg, who was conducting a collection agency. John R. McDonnell, a justice of the peace of the town of Lyons, Cook county, kept his docket at No. 155 on the same street. One H. C. Kimball had been engaged in the laundry business and failed, owing certain persons for labor. These claims were placed in the hands of Frankenberg for collection. The claims were paid by Kimball before suit was commenced and the receipts exhibited by him to Frankenberg. Notwithstanding this fact Frankenberg began suit before McDonnell on the claims, and at the trial Kimball appeared and presented his receipts to the justice, who nevertheless rendered judgment against him. Frankenberg sued out an immediate execution, which upon its face was for labor, and was placed in the hands of plaintiff in error, Luddy, who went to the house where Kimball resided with his wife, Lucy J. Kimball. The family was absent, and the domestic in charge was informed by Luddy

that he was there for the purpose of making a levy under the execution. She notified him that the property belonged to Mrs. Kimball. Luddy nevertheless loaded the goods into a moving van which he had brought for the purpose of removing them. The name on the side of the van was covered so that the vehicle could not be identified. Upon the return of Lucy J. Kimball to her home she went to the office of the plaintiff in error to demand her goods, but he was not there. She went to his office on several other occasions and also sent her attorney, but Luddy could not be found. She then sent him a registered letter, notifying him that the goods were hers and requesting him to return them; also that the judgment upon which the execution had been issued was paid, and evidence of that fact had been filed with the justice. The carrier to whom this registered letter was given for delivery to Luddy went to his office a number of times but failed to find him, and finally left a notice at his office requesting him to go to the post-office and get the letter, which he failed to do. Twenty-five or thirty days after the levy Mrs. Kimball went to the house of Frankenberg and there found the more valuable articles which had been taken from her house. Other portions of the goods were found even at the time of Luddy's trial, where they had been concealed by him. Other articles were found stored in a vault in Frankenberg's office. During all the time Mrs. Kimball was trying to locate Luddy at his office he and Frankenberg met there daily.

As a ground of reversal it is contended that plaintiff in error should be protected because he was a duly elected, authorized and acting constable; that the execution was regular upon its face; that he was merely doing his duty; that he had no legal notice of Mrs. Kimball's ownership of the goods until after the sale; also that the evidence does not sustain the verdict. There can be no doubt but that a constable acting in good faith under a writ regular upon its face will be protected in a reasonable and lawful performance

of his duty, and if that were the only question presented in this case it would be easy of solution. But the fact that a man is a constable and holds a writ regular on its face does not authorize him to do illegal and unlawful acts under the cloak of such authority. The mere fact that he is an officer should be a sufficient guaranty that he will act lawfully and that people who have to deal with him will be protected in their rights. If he steps over the bounds of his duty and arbitrarily and unlawfully does things which he is prohibited from doing, it is all the more reason why he should be punished for his illegal acts.

The only question for determination in this case is whether the plaintiff in error was proven guilty of larceny as charged in the indictment. The evidence tends very strongly to show, and would justify the finding, that the justice, constable and Frankenberg were all in a conspiracy from the beginning to get possession of the goods in question unlawfully. The judgment itself was rendered wrongfully and against positive proof that the account on which it was based had been fully paid. The receipts showing payment were filed with the justice and were afterwards destroyed by him. Although the judgment may have been improperly rendered, still if the plaintiff in error had performed only his duty he would be justifiable under his writ, but when he went to the house to get the goods he concealed the name of the van, and after he got possession of the goods evaded and concealed himself from the rightful owner. The inquiry naturally arises, if he was acting under a proper writ and only doing his duty why did he do this? He knew, or was bound to know, that the owner of the goods had a right to make a demand upon him for their possession, and it was his duty as an officer to conduct himself in such a manner that she could find him if she so desired, by a reasonable effort on her part. When an officer hides himself so that he cannot be found and proper notice served upon him, as the evidence in this case shows the plaintiff in error did, he

violates the plain provision of the law as well as his oath of office. The evidence also shows that even after the goods had been taken and a pretended sale made, a part of them were found where they had been concealed by plaintiff in error and Frankenberg. The concealment of the goods, or a part of them, was very strong evidence of the felonious intent on the part of those hiding them. The evidence and all of the circumstances surrounding the case indicate a deliberate intent on the part of plaintiff in error and his confederates to unlawfully steal, take and carry away the property of the owner, rather than a purpose to take it for the satisfaction of a debt under process of law. This is not a case of the mere abuse of process, but one in which the officer attempted to use his writ to cover up a criminal offense.

The evidence in this case amply sustains the conviction, and the judgment will be affirmed.

Judgment affirmed.

CARTWRIGHT, C. J., and MAGRUDER and BOGGS, JJ., dissenting.

CLARENCE W. MARKS v. THE COLUMBIA YACHT CLUB,
and

SAME v. THE CHICAGO YACHT CLUB.

Opinion filed December 20, 1905—Rehearing denied Feb. 21, 1906.

INJUNCTION—*right to assess solicitors' fees as damages on dissolution of injunction.* If an injunction is the primary object of a suit and there is a motion to dissolve, a reasonable solicitor's fee, based upon the labor performed in procuring the dissolution of the injunction, may be allowed as damages, without regard to the fact that a demurrer was interposed or that the knowledge gained on the hearing of the motion to dissolve was subsequently used upon the trial of the case on its merits.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. LOCKWOOD HONORE, Judge, presiding.

The questions involved in both of these cases are identical and will be disposed of together.

On May 21, 1901, the appellant, Clarence W. Marks, filed his bill in the circuit court of Cook county against the Chicago Yacht Club and the Columbia Yacht Club, in which he alleged that the latter club was wrongfully constructing a club house immediately adjoining the inner breakwater on the east and just south of the south line of Randolph street extended, and that the former club was wrongfully building a club house on the lake front at the foot of Monroe street extended, both in the city of Chicago; that appellant was the owner of property fronting on Michigan avenue and overlooking the lake, and the said buildings obstructed the view of Lake Michigan from appellant's lots and interfered with the right of ingress to and egress from Lake Michigan thereto. The prayer of the bill was for an injunction restraining appellees from erecting or continuing to erect said buildings, and for a mandatory injunction to remove the portions of the structures already erected. The court issued a temporary injunction as prayed, without notice, and the same was served on appellees on May 22, 1901. Both appellees filed general demurrers to the bill and made motions to dissolve the temporary injunction. Upon a hearing both demurrers were overruled. The Chicago Yacht Club withdrew its motion to dissolve the temporary injunction, and it was ordered that the cause stand, as to it, the same as if no such motion had been made, and an appeal was perfected to the Appellate Court upon the injunction order, where the decree of the circuit court granting the temporary injunction was reversed. (*Chicago Yacht Club v. Marks*, 97 Ill. App. 406.) The motion to dissolve the temporary injunction was allowed by the chancellor as to the Columbia Yacht Club. On April 24, 1904, the original bill was dismissed by the circuit court, but jurisdiction was retained solely for the purpose of assessing damages for the wrongful suing out of the temporary injunction. Each of appellees

filed suggestions of damages, and upon a hearing the damage of the Chicago Yacht Club was fixed at \$1200 and that of the Columbia Yacht Club at \$700. This decree has been affirmed by the Appellate Court, and a further appeal has been prosecuted to this court.

STEIN, MAYER, STEIN & HUME, (PHILIP STEIN, of counsel,) for appellant.

ARNOTT STUBBLEFIELD, and WILLIAM H. QUINLAN, for appellee the Columbia Yacht Club.

N. W. HACKER, and GEORGE B. SHATTUCK, for appellee the Chicago Yacht Club.

Mr. JUSTICE WILKIN delivered the opinion of the court:

The appellant, as grounds of reversal, urges that the amounts of damage are excessive, and that the services of the solicitors, upon which the claims were based, were rendered, partly at least, upon the arguments of the general demurrer to the bill and in general defense of the case, and not solely upon the dissolution of the temporary injunction. We do not see how there can be any misunderstanding as to the law applicable to the facts of this case. The allowance of these damages for service rendered in obtaining the dissolution of the temporary injunction is governed by section 12 of chapter 69. (Hurd's Stat. 1903, p. 1042.) This section has been upon the statute books for over a quarter of a century and has been before this court for construction on many different occasions. One of the latest cases is that of *Landis v. Wolf*, 206 Ill. 392, where we reviewed our former decisions and held that solicitors' fees which are necessarily incurred in procuring the dissolution of an injunction may be allowed as damages, but that where an injunction is merely ancillary to the principal relief sought by the bill and its dissolution is only incidental to the defense made and the counsel fees are incurred in defending the suit generally or

in the management of some other branch of the case, they cannot be assessed as damages. The damages allowed by the statute are only those sustained by reason of an improper and wrongful suing out of the injunction, and the solicitors' fees can only extend to the motion to dissolve. It makes no difference whether there was a demurrer interposed or not, or that the knowledge about the case gained upon the hearing of the motion to dissolve was subsequently used upon the trial of the case on its merits. If the injunction is the primary object of the suit and a motion is made to dissolve, counsel will be entitled to a reasonable fee based upon the labor performed in the attempt to dissolve.

From an examination of the record it appears that the questions asked the witnesses at the hearing on the suggestions of damages were limited to the usual and customary charge for services of attorneys in cases similar to the one at bar. The questions covered the nature of the work of the attorneys in detail, and were limited to the work done on the motion to dissolve the temporary injunction. In the case of the Columbia Yacht Club the motion to dissolve was argued only in the circuit court, while as to the other appellee it was carried through the Appellate Court. We fail to find any place in the record where there is any objection to any material part of the evidence offered on the suggestion of damages. The decree awards the amounts of damages by reason of the expense for legal services in procuring the dissolution of the temporary injunction, and recites that they were for legal services rendered for the sole purpose of procuring the dissolution. We do not see how a finding could be more specific. The court apparently had in mind the correct rule of law, both at the time the evidence was taken and at the time the decree was rendered. From an examination of the record we are also convinced that the amounts allowed were reasonable under the evidence submitted.

We find no reversible error, and the decree will be affirmed.

Decree affirmed.

MARY N. SALMON, EXRX.

v.

LIBBY, MCNEILL & LIBBY.

Opinion filed December 20, 1905—Rehearing denied Feb. 21, 1906.

1. PLEADING—*when declaration defectively states a good cause of action.* A declaration alleging, in substance, that the defendant negligently manufactured mince meat so that the same became poisonous, and that the plaintiff's testator, when lawfully partaking of the same, was poisoned and died, and setting out a statute permitting a recovery for the death of a person caused by the wrongful act or omission of another, states a good cause of action, although it is defective in failing to specify the particular negligence.

2. LIMITATIONS—*plea of statute not good if original declaration states a good cause of action, though defectively.* If the original declaration states a good cause of action, although defectively, a plea of the Statute of Limitations to an amended declaration supplying the defects in the original declaration is not a good defense.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on writ of error to the Superior Court of Cook county; the Hon. JONAS HUTCHINSON, Judge, presiding.

This was an action on the case to recover damages for the death of the plaintiff's testator, caused, as it was alleged, from eating a piece of mince pie made from mince meat which was poisonous and destructive to human life, and which mince meat was prepared, put up in a package and sold to the trade by the defendant, and which in the due course of business passed through the hands of a wholesale dealer, a retail dealer and came into the hands of one Sarah E. Hoffman, in the State of Kansas, and was made by her into a pie, of which the plaintiff's testator there ate, and in consequence of which he died.

The original declaration contained three counts. A demurrer was sustained thereto, whereupon, and more than

two years after the cause of action accrued, an amended declaration was filed, to which a demurrer was also sustained. Afterwards a second amended declaration was filed, to which the general issue and two pleas, which averred the cause of action stated in the second amended declaration did not accrue within two years, were filed. Thereupon the general issue was withdrawn and the court overruled a demurrer to the pleas of the Statute of Limitations, and plaintiff having elected to stand by her demurrer, the case was dismissed at plaintiff's costs, which judgment was affirmed by the Appellate Court for the First District, and a writ of error has been sued out from this court to review the judgment of the Appellate Court.

The action was brought under a statute of the State of Kansas, which is set out in each count of the original declaration, and which permits a recovery by the personal representative of the deceased person, for the benefit of the widow and children, if any, or next of kin of such person, when his death has been caused by the wrongful act or omission of another. The original declaration counted upon the negligence of the defendant, and it is not alleged in either count of said declaration that the defendant knew the mince meat was poisonous when it prepared the same, or when it placed the same in packages, or when it put the same upon the market, nor is it alleged that said mince meat became poisonous from any specific negligent act of the defendant in preparing the same or in putting the same in said package,—that is, no such negligent act is particularly and definitely set out, and it is contended by defendant that as a consequence of the absence of these allegations no cause of action appeared.

MERRIAM & PHELPS, (J. W. MERRIAM, of counsel,) for plaintiff in error.

ALBERT H. & HENRY VEEDER, and LOUIS C. EHLE, for defendant in error.

Mr. JUSTICE SCOTT delivered the opinion of the court:

Each count of the original declaration charged, in substance, that the defendant negligently and improperly prepared and manufactured the mince meat in question; that as a result the same became unfit for food and became poisonous and destructive to human life when used as food, and that plaintiff's testator, lawfully partaking of the same, was poisoned and lost his life in consequence thereof.

The Kansas statute which is set out in each count permits a recovery where the death of any person has been caused by the wrongful act or omission of another.

We are disposed to think that each of the counts of the original declaration defectively stated a good cause of action. It is true that in neither count is the particular negligence, which it is claimed constituted an actionable wrong, described in apt words, but it is charged in general terms that the meat was poisonous as a consequence of its negligent and improper preparation by the defendant, and this averment, taken in connection with the Kansas statute set out in connection therewith, shows the existence of an actionable wrong, though when tested by demurrer the lack of particularity in the averments was fatal to each count.

The original declaration did not state a defective cause of action,—it stated defectively the good cause of action which is set out by the second amended *narr*. Therefore the demurrer to the pleas setting up the Statute of Limitations should have been sustained. *Eylenfeldt v. Illinois Steel Co.* 165 Ill. 185, and cases there cited.

The judgments of the Appellate Court and superior court will be reversed, and the cause will be remanded to the latter court with directions to sustain the demurrer to the pleas of the Statute of Limitations, and for further proceedings consistent with this opinion.

Reversed and remanded, with directions.

HENRY H. GAGE*

v.

THE PEOPLE *ex rel.* John J. Hanberg, County Treasurer.*Opinion filed December 20, 1905—Rehearing denied Feb. 21, 1906.*

SPECIAL ASSESSMENTS—*section 84 of the act of 1901 does not apply to improvements already completed.* Section 84 of the Local Improvement act, (Laws of 1901, p. 114,) requiring the board of local improvements to certify the cost of the improvement to the court within thirty days after final completion and acceptance of the improvement, has no application to improvements completed and accepted more than thirty days prior to the time such section became effective, notwithstanding the language of section 99 thereof.

APPEAL from the County Court of Cook county; the Hon. ORRIN N. CARTER, Judge, presiding.

F. W. BECKER, for appellant.

ROBERT REDFIELD; and JOHN M. O'CONNOR, (JAMES H. LEWIS, Corporation Counsel, of counsel,) for appellee.

Mr. JUSTICE SCOTT delivered the opinion of the court:

This is a consolidation of two appeals, one of which is from a judgment of the county court of Cook county for the fifth installment of a special assesment for paving Fulton and other streets, and the other from a judgment of the same court for the fifth installment of a special assessment for paving Turner avenue. Both judgments were rendered at the June term, 1905, of the county court. Objections were filed by Henry H. Gage, the owner of the lots against which the judgments were rendered, and were in each instance overruled. Gage prosecuted an appeal from each judgment, and those appeals have been consolidated in this court, as the same grounds are relied upon in each for reversal.

The first point made by appellant in each of these cases is thus stated in his brief:

*Consolidated case, being Nos. 4503 and 4515.

"No certificate of cost was filed pursuant to section 84 of the act of 1901, which was a condition precedent to the issue of the warrant,—that is, to the existence of delinquency, without which there was no legal right to apply for judgment and order of sale."

The certificate required by section 84, *supra*, is to be made by the board of local improvements and filed with the court in which the assessment was confirmed within thirty days after the final completion and acceptance of the work. In one of these cases the work was completed and accepted on September 20, 1899, and in the other on July 14, 1900. As section 84 of the act of 1901 became effective July 1, 1901, it is apparent that it was impossible to comply with that section by filing the certificates thereby required in the cases now before us.

Appellant urges that inasmuch as section 99 of the Local Improvement act of 1901, being section 605 of chapter 24, Hurd's Revised Statutes of 1901, contains this provision: "When any installment of an assessment confirmed under prior acts shall mature, proceedings to return the same delinquent, and to collect the same shall conform to the provisions of this act," section 84 of the act 1901 is thereby made applicable in this proceeding, and that upon that act becoming effective it at once became the duty of the proper officers to file the certificate required by that act, which appellant urges would have been a compliance with that act "except as to time."

We think the language quoted from section 99, *supra*, cannot be construed to require the filing of a certificate under section 84, *supra*, in a case where the time within which that certificate is by the latter section required to be filed had elapsed long prior to the date on which that section came into force.

The other errors assigned which are called to our attention are identical with those passed upon adversely to the contention of appellant in the consolidated cases of *Gage v.*

People, (*ante*, p. 369.) It is unnecessary to repeat here the reasoning of the court found in the opinion in those cases. The views there expressed control here.

The judgments of the county court will be affirmed.

Judgments affirmed.

ARTHUR M. GOODRICH

v.

NANCY E. GOODRICH *et al.*

Opinion filed December 20, 1905—Rehearing denied Feb. 21, 1906.

PARTITION—*when bill for partition and accounting will not lie.* Where a testator leaves his estate, real and personal, to his widow, to be "paid or divided" among his children equally, as she may deem best, the children are not entitled to any portion of the estate until the widow exercises her power of appointment, and they cannot maintain against her a bill for partition and an accounting of rents and profits.

APPEAL from the Circuit Court of Woodford county; the Hon. G. W. PATTON, Judge, presiding.

BARNES & MAGOON, and JAMES A. RIELY, for appellant.

HARRY THOM, and THOMAS KENNEDY, for appellees.

Mr. JUSTICE SCOTT delivered the opinion of the court:

This was a bill for partition filed by the appellant in the circuit court of Woodford county. The bill alleges that Caleb W. Goodrich died in May, 1889, leaving Nancy E. Goodrich, his widow, Frank H. Goodrich, Ellen A. Goodrich and Annette N. Clark, appellees, and Arthur M. Goodrich, the appellant, his children. He died possessed in fee simple of 240 acres of land in Woodford county, which land is the subject of controversy in this suit. He left a last will and testament, which was executed in 1869 and was ad-

mitted to probate shortly after his death. Aside from the formal portions of the will and a clause appointing Nancy E. Goodrich executrix, his will consisted of but one clause, which reads as follows:

"I give and bequeath to my wife, Nancy E. Goodrich, all the real estate and personal property of what nature or kind soever, to be by her paid or divided equally between my four children, namely, Frank H. Goodrich, Arthur M. Goodrich, Nettie L. Clark and Ellen A. Goodrich, as she may deem best for each of those children. Said Nancy E. Goodrich having power to sell and dispose of any and all my property in my possession at the time of my death for the payment of my just debts, provided that no part of my real estate be sold at public auction until after three years after my decease."

The widow never qualified as executrix, the estate never was administered, and the widow is still living but has never executed the power conferred upon her by the will to divide the property owned by the deceased among the four children. The bill was an ordinary bill for partition, by which it was sought to have the dower of the widow set off to her and the lands divided among the four children named in the will, and praying for an accounting for rents and profits.

The defendants below filed a general demurrer to the bill, which was sustained at the April term, 1904, of the circuit court. At the September term, 1904, the complainant moved to amend the bill by amplifying the statements thereof with reference to rents and profits, which amendment the court refused to allow and dismissed the bill for want of equity. The complainant appealed to this court. Error is assigned upon the action of the court in sustaining the demurrer, in refusing to allow the amendment and in dismissing the bill.

We consider much of the argument and many of the authorities presented by the solicitors for the respective parties inapplicable in this case. An inspection of the will and

a consideration of the facts set up by the bill lead us to conclude that the demurrer was properly sustained, and that the proposed amendment, if allowed, would still leave the bill, as amended, obnoxious to a demurrer.

Evidently the testator, Caleb W. Goodrich, took into consideration the fact that when the time arrived at which his property was to be divided among his four children, while each was to have the one-fourth part thereof in value, still the conditions then surrounding his children might be such that certain portions of the property would be better adapted to the use of certain of his children than would other portions thereof. Whether or not this should be true the widow was to determine and make payment and division accordingly.

The case of *Robison v. Botkin*, 181 Ill. 182, is similar in principle to the one at bar, and the reasoning of the court in that case warrants the conclusion that the appellant's bill is without merit.

Until the widow exercises the power of appointment given her, either voluntarily or in accordance with the adjudication of a court of competent jurisdiction, the children are not entitled to any portion of the property left by the father, unless, indeed, the widow should die leaving the power unexecuted.

The only proposition which we now decide is, that a bill for partition and accounting for rents and profits would not lie at the time this proceeding was commenced. No other question is now before us, as this is not a bill seeking a construction of the will.

The decree of the circuit court will be affirmed.

Decree affirmed.

MARY COMPHER *et al.*

v.

CAROLINE MARK BROWNING *et al.*

Opinion filed February 21, 1906.

1. WILLS—*what does not tend to show undue influence.* That the testatrix, who was a woman of wealth and having many business interests and much property to look after, employed the man whom she afterwards made one of the executors of her will as her agent and gave him full power of attorney to act for her, does not tend to show undue influence by him over her, where she had previously had other agents for the purpose of managing her property, since the execution of such power of attorney would be a proper way of authorizing the agent to demand possession of her property so far as it was in control of the former agents.

2. SAME—*fact that confidential agent procures will to be drawn does not show undue influence.* The fact that a confidential agent of the testatrix draws her will or procures it to be drawn, in which he is appointed one of the executors, entitled, under its terms, to such compensation as the executors might deem just and reasonable, may be a suspicious circumstance calling for careful scrutiny, but does not, of itself, invalidate the will, there being no proof that such agent practiced any fraud or imposition or exercised any undue influence in the making of the will.

3. SAME—*fact that testatrix is uneducated does not justify setting aside her will.* Lack of education and culture on the part of the testatrix, who is otherwise a woman of strength of mind and intellect and business capacity, even though she is unable to read, does not justify setting aside her will, where she was able to and did sign her name to the instrument.

4. SAME—*what does not show that will is not that of the testatrix.* Employment, by an agent of the testatrix, of an attorney to draw the will who lived in another town than where the testatrix resided, does not show that the will was rather the production of the agent than of the testatrix, where the testatrix herself did not employ local attorneys in her business, and where the provisions of the will as made correspond with her previous declarations as to her intentions in disposing of her property.

5. SAME—*testatrix is presumed to have known contents of will.* A will duly executed by the testatrix, who is shown to be a woman of sound mind, will not be held invalid for want of proof that the will was read by her or to her, even though the will is prepared at

the direction of her confidential agent but who is not shown to have practiced any fraud or imposition, since proof of the signature of the testatrix is *prima facie* proof she knew the contents of the will.

6. EVIDENCE—*when evidence tending to show mental condition is inadmissible.* Proof of statements made by the testatrix to a witness is not admissible in a proceeding to contest the will, as tending to show the mental condition of the testatrix, where the contestants have repeatedly admitted in open court that the testatrix was of sound mind and memory.

7. SAME—*proof of declarations inconsistent with will is not admissible.* Proof of declarations of the testatrix to a witness with reference to an intended disposition of her property inconsistent with the disposition made thereof by the will is not admissible, there being no question as to the fact that the testatrix was of sound mind and memory.

8. SAME—*proof that testatrix was easily influenced is not admissible.* Proof that the testatrix was a woman who was easily influenced and susceptible to flattery is not admissible in a proceeding to contest a will, that matter being one of mere opinion or conclusion on the part of the witness.

9. INSTRUCTIONS—*when instruction excluding issue of mental capacity is proper.* An instruction in a will case excluding the issue of mental capacity of the testatrix because the contestants had admitted in open court that she was of sound mind and memory is not error, even though there are minor parties who could not be bound by such admission, where the evidence clearly shows, without contradiction, that the testatrix was of sound mind and memory.

10. SAME—*when instruction as to proof of undue influence is proper.* An instruction in a proceeding to contest the will of an admittedly sane person upon the ground of undue influence is proper which holds that it is not sufficient to set aside the will that the facts and circumstances proven are consistent with the hypothesis of undue influence, but it must be shown that such facts and circumstances are inconsistent with a contrary hypothesis.

11. SAME—*instruction stating that burden of proof shifts to proponents is improper.* In a proceeding to contest a will for undue influence of one of the executors, an instruction is improper which holds that if the jury find that confidential relations existed between such person and the testatrix, the burden of proof shifted to the proponents to show that the alleged will was the free and voluntary act of the testatrix.

12. APPEALS AND ERRORS—*when record of another proceeding cannot be considered—release of errors.* On writ of error to review a decree upholding a will, the record of a subsequent com-

promise suit by which certain of the parties to the suit to contest the will had accepted the provisions of the will and had agreed to terminate the litigation cannot be considered, where no plea of release of errors was filed in the proceeding sought to be reviewed.

WRIT OF ERROR to the Circuit Court of Carroll county; the Hon. JAMES S. BAUME, Judge, presiding.

This is a bill, filed on July 13, 1901, in the circuit court of Carroll county to set aside the will of Caroline Mark, deceased. The bill is filed by Mary Compher, a half-sister of the deceased testatrix, and certain other persons, who are her nephews and nieces and grand-nephews and nieces, against Caroline Mark Browning, and others, devisees and legatees under her will, and also against Oscar F. McKenney and Frederick S. Smith, executors of her last will. Some of the complainants are minors, suing by a next friend, and some of the defendants are minors, for whom a guardian *ad litem* was appointed. As appears from the allegations in the bill and the proofs introduced, Caroline Mark, the testatrix, executed her will March 24, 1894, when she was about seventy-four years old. She was at that time a widow, her husband having died in 1869. She died testate on April 27, 1900, leaving no husband or children, or descendants of children, but leaving said half-sister, and certain nephews and nieces and grand-nephews and nieces, as her only heirs-at-law. Her will was admitted to probate in the probate court of Carroll county on June 4, 1900, and letters testamentary were issued thereon to said McKenney and Smith. By her will Caroline Mark, the testatrix, devised and bequeathed to the defendants below, Caroline Mark Browning, Gertrude Mark Browning, and Annie Mark Burns, afterwards the wife of William Tipton, certain real and personal property of the value of \$40,000.00; to the complainants, Annabelle Hull, Laura V. Paugh, William Russell, Jane Gable Countryman, Nathaniel Russell, William Wade and Nancy Ellen Sisler, nieces and nephews, realty and personalty, valued at \$60,-

000.00; to Charles Hull and Albert Hull, \$500.00 each; to Mary Ann Warfield and Elizabeth Rinehart, who has since died, \$100.00 each; and the remainder of her estate, amounting in value to some \$300,000.00 or more, to Oscar F. McKenney and Frederick S. Smith, as trustees for the purpose of building and maintaining a home for the aged women of Carroll and adjoining counties.

The bill alleges and charges that Caroline Mark, at the time she executed the instrument in question, was not of sound mind and memory, but of weak and unsound mind, and in her dotage; that she was illiterate and aged and incapable of managing her estate or of making any just or proper distribution thereof; that Oscar F. McKenney was in complete control and possession of her money and securities, amounting to over \$400,000.00, and that she had no conception of the value of her estate; that he had absolute control and dominion over her mind, and through fraud, falsehood and misrepresentation, induced her to execute the instrument, and dictated its terms, and that she did not understand its contents.

Subsequently, on December 10, 1901, by amendment to the bill, Annabelle Hull, Laura V. Paugh, William Russell, Emily J. Countryman, Nathaniel Russell, William Wade and Nancy Ellen Sisler, devisees and legatees under the will, were made defendants thereto instead of complainants.

McKenney and Smith, executors, filed separate answers, in which they admit that the bequests and devises were made and the will admitted to record as set forth in the bill, but aver that the testatrix was of sound mind when she executed her will; that she was a woman of vigorous intellect, knew the objects of her bounty, and was capable of managing and disposing of her estate. They deny that McKenney resorted to falsehood and misrepresentation to induce the execution of the will, or that the testatrix was under any improper restraint, or undue influence, when she signed it. They admit that McKenney was her agent and in control and possession

of her moneys and securities, but state that he always followed her directions in the management of her estate. A guardian *ad litem* was appointed for the infant defendants, who appeared and answered for them, submitting their rights to the protection of the court. To this answer and the separate answers of the executors replications were filed; and defaults were entered against the other defendants, and the bill taken as confessed by them.

Caroline Mark, the testatrix, resided in the city of Mount Carroll, Carroll county. Early in 1893 she owned, among other property, stock in the First National Bank of Mount Carroll of the market value of about \$30,000.00. At that time Oscar F. McKenney was connected with the Carroll County Bank, and on April 7, 1893, Mrs. Mark, the testatrix, executed to him a power of attorney "constituting him her lawful agent and custodian of all her personal estate, consisting of money, notes, mortgages, bonds and securities, and granting unto him full power to properly and safely lend and invest the same or the proceeds thereof in her name, and giving and granting unto him full power and authority to do and perform every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully for all intents and purposes as she might or could do if personally present," etc. As her agent thus constituted, McKenney came into possession of her money and securities, then valued at about \$300,000.00, and was in possession of the same at the time of her death. Her will was drawn by an attorney, named A. F. Wingert, who lived in Savanna, a city in Carroll county. Wingert was employed by McKenney to draw her will. About a dozen conferences occurred between McKenney and Wingert in regard to the drawing of the will, and, after it was prepared by Wingert, it was forwarded to McKenney at Mount Carroll. By the terms of the will, the executors and trustees, McKenney and Smith, are not required to give bond, and it is therein provided as follows: "It is my will that my estate be charged with the payment

of such reasonable compensation to the said Oscar F. McKenney and Frederick S. Smith as they may deem just and proper, according to the time and attention they may severally devote to the affairs of my estate." The executors and trustees are also given power to appoint their own successors. On March 18, 1902, issues of fact were made to be tried by a jury. As to the form of the verdict the court submitted to the jury the following: "The following issues of fact are submitted to you for determination in this case: First: Is the writing read in evidence, purporting to be the last will and testament of Caroline Mark, deceased, the last will and testament of said Caroline Mark? Second: Was the writing read in evidence, purporting to be the last will and testament of Caroline Mark, deceased, caused to be executed through the undue influence of the defendant, Oscar F. McKenney, exercised on said Caroline Mark? Third: Did the said Caroline Mark, at the time of the execution and attestation of the said writing read in evidence, purporting to be the last will and testament of the said Caroline Mark, know and understand the contents of said instrument, purporting to be her last will and testament? If you find for the proponents upon the first issue, the form of your verdict will be: 'We, the jury, find that the writing read in evidence purporting to be the last will and testament of Caroline Mark, deceased, is the last will and testament of said Caroline Mark.' If you find for the contestants upon the first issue, the form of your verdict will be: 'We, the jury, find that the paper read in evidence, purporting to be the last will and testament of Caroline Mark, deceased, is not the last will and testament of said Caroline Mark.' In determining the second and third issues, you will designate the same as follows: If you determine the second issue in the affirmative, you will say: 'As to the second issue, we answer, Yes.' If you determine the second issue in the negative you will say: 'As to the second issue we answer, No.' If you determine the third issue in the affirmative you will say: 'As to

the third issue, we answer Yes.' If you determine the third issue in the negative you will say: 'As to the third issue, we answer No.' " The verdict of the jury was as follows: "We the jury find that the writing read in evidence purporting to be the last will and testament of Caroline Mark, deceased, is the last will and testament of said Caroline Mark. As to the second issue, we answer, No. As to the third issue, we answer, Yes."

Motion for new trial was made and overruled, and on March 25, 1902, a decree was rendered in accordance with the verdict of the jury, and dismissing the bill for want of equity, and requiring that the contestants pay the costs, and that execution issue therefor, to the entry of which decree exception was taken by the complainants.

The present writ of error is prosecuted from the decree so entered by the trial court.

PIERSON, PEASE & DEYOUNG, (ENOCH E. MCKAY, and FREDERIC R. DEYOUNG, of counsel,) for plaintiffs in error.

W. H. A. RENNER, and FREDERICK S. SMITH, (J. C. SEYSTER, of counsel,) for defendants in error.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

First—The first point made by plaintiffs in error in favor of a reversal of the decree below, sustaining the validity of the will of the testatrix, Caroline Mark, deceased, is that the verdict and decree are not sustained by the evidence.

As to the allegation in the bill, that the testatrix, at the time of the execution of her will, was not of sound mind and memory, that allegation is not sustained by the proof. On the contrary, the overwhelming weight of the testimony shows, that, when she made her will, Mrs. Mark was a woman of remarkably strong intellect, and of unusually sound

mind and memory. Indeed, no proof was introduced by the contestants for the purpose of showing that she was not of sound mind and memory. But, in the course of the trial, counsel for the contestants admitted that she was a woman of sound mind and memory, and disclaimed any intention of making any insistence to the contrary. If, therefore, the verdict of the jury is not sustained by the evidence, it must be that the verdict is not so sustained, so far as it refers to the question of undue influence. The main inquiry, therefore, so far as the facts are concerned, is whether there was sufficient evidence, showing that the will was not obtained by undue influence on the part of Oscar F. McKenney, one of the executors and trustees, to justify the jury in finding the verdict, which they returned. The testatrix was some seventy-three or seventy-four years of age, when she made her will on March 24, 1894, and lived some six years thereafter, dying at the age of about eighty years. The evidence does not show that, during the period of her life, after the execution of her will, she made any complaint in regard to its provisions, or expressed any regret that it had not been made differently.

One of the circumstances, insisted upon as showing undue influence, is the fact that Mrs. Mark, in the winter or spring of 1893, employed Oscar F. McKenney to act as her agent in the management of her personal property, and executed to him the power of attorney, dated April 7, 1893, mentioned in the statement preceding this opinion. The proof tends to show that Oscar F. McKenney was the president or manager of a bank in Mount Carroll, and was a business man of ability and large experience. The testimony shows that he stood high in the community as a man of integrity and business capacity. Mrs. Mark had a large amount of personal property. An inventory of her estate was introduced in evidence, and is in the record. This inventory shows that, at that time, she had notes, mortgages, bonds and other securities, good and collectible, aggregating the

sum of \$320,782.06, and other choses in action, good and collectible, amounting to \$385.50; that she had cash on deposit in the Carroll County Bank of Mount Carroll, \$25,096.67; cash at her residence, \$1104.90; two hundred shares of stock of the First National Bank of Mount Carroll, valued at \$32,000.00; notes, securities and choses in action, listed as desperate, amounting to \$5626.28. The inventory also shows that she owned more than two hundred and twenty cattle, about four hundred hogs, more than twenty horses, and a large amount of grain, farming implements, and other personal property. In view of her advanced age, and in view of the amount and character of the personal property thus owned by her, it was natural that she should select some competent business man to manage her affairs for her. The proof shows that, in addition to the personal property in question, she owned, from 1892 to 1896, in the neighborhood of sixteen hundred acres of farming land, exclusive of timber, and other real estate in Mount Carroll, Savanna, and elsewhere. She conducted farming operations on some of these lands during the time in question. She employed McKenney to assist her in handling her loans and moneys, and another agent to help her in looking after her farming operations. In addition to this, the testimony shows that she had, before the appointment of McKenney, employed other agents to assist her in managing her personal and real property. One of these was named Ashway, with whom she appears to have had a litigation. Another was a man named Miles, and still another a man named Bucher. In view of the fact, that other agents had been employed to look after her affairs, and would therefore naturally be in the possession or control of much of her property, it was reasonable and natural that she should execute the power of attorney in question to the new agent, McKenney, in order that the latter might use such power of attorney as his authority for demanding the possession of her personal property from the other agents, so far as it was still under the control of the latter.

It is to be noted that McKenney was not appointed by the will as the sole executor and trustee thereunder, but that associated with him was Frederick S. Smith. It is also to be noted that no legacy or devise was made to McKenney, or to Smith, by the terms of the will; and all the pecuniary benefits, which they were entitled to receive from their position as executors and trustees, were such compensation for their services, as would be reasonable and just and proper. It is true that the will charges the estate "with the payment of such reasonable compensation to the said Oscar F. McKenney and Frederick S. Smith, as they may deem just and proper, according to the time and attention they may severally devote to the affairs" of the estate. But the provision in question would naturally be construed by any court, as authorizing them to receive only such compensation for their services in executing the trust, as the law itself would allow, or as the court would determine to be reasonable. It seems from the evidence that McKenney himself desired the will to be so drawn as that he would have an associate in the management of the interests of the estate, as he was himself in ill-health, and had business of his own to attend to. It also appears that Mrs. Mark herself was consulted as to the choice of Frederick S. Smith to act as co-executor and trustee with McKenney. The facts, that a confidential agent of a testator or testatrix has drawn the will, or procured it to be drawn, and has been made executor and trustee thereunder, may be suspicious circumstances, which call for additional scrutiny as to the fairness of the transaction; but these facts alone do not invalidate the will where all the other circumstances, developed by the evidence, show that there was no fraud, or imposition, or attempt to exercise undue influence. (Schouler on Wills,—2d ed.—sec. 245.) In *Livingston's Appeal from Probate*, 63 Conn. 69, it was held that the rule, under which undue influence is inferred from a confidential relation between the testator and the person procuring the will, has no application where such person takes nothing

under the will; and that, where a lawyer, who has for a long time been the confidential adviser of a testatrix, draws her will, and by it is made executor of the will and a trustee under it, he is not to be regarded as taking beneficially under the will, but only as accepting duties under it which the testatrix imposes. In the case at bar, McKenney was only given power "to properly and safely loan and invest" the money and personal property of the testatrix, and had no power to convey real estate or release mortgages; and the proof shows that the testatrix herself executed such releases, whenever it was necessary to do so, up to the time of her death, and that she was consulted about, and informed of, all that took place in the management of her affairs.

We see nothing in the evidence to indicate that any undue influence was exercised over Mrs. Mark, arising out of the fact that McKenney acted as her agent, and that he was appointed executor by the terms of the will.

It is said that the testatrix was ignorant, and could not read. There is testimony, tending to show that she could read, and there is also testimony to show that she could not read. It is clearly proven that she could write her signature, and the witnesses of her will testify that they saw her sign the will. It is undoubtedly true that she was not an educated or cultured woman, and that, if she read at all, she read with difficulty. The testimony shows, however, that, when she was a girl, she went to school, and one of the witnesses testifies that the latter went to school with her in the city where she lived before she came to Illinois. We do not think that, in view of the overwhelming testimony as to the strength of her mind, and the clearness of her intellect and her capacity in the matter of looking after her property interests, her illiteracy is a sufficient circumstance to justify the setting aside of her will. In *Wombacher v. Barthelme*, 194 Ill. 425, it was held that testimony, that the testator could not read English writing, nor write except to sign his name, had no tendency

to establish either his inability to make a will, or his ignorance of the contents of the will which he executed.

It is said, however, that the fact, that McKenney went to Savanna in Carroll county, and procured a lawyer there to draw the will, instead of employing a lawyer in Mount Carroll where the testatrix lived, to do so, is a suspicious circumstance, and indicates that the will was rather the production of McKenney, than of the testatrix herself. The testimony tends to show that the testatrix preferred to employ lawyers, living away from the town where she resided. She had a litigation with a former agent, named Ashway, and, instead of employing a lawyer in Mount Carroll to try the suit for her, she employed Mr. Sheean, an attorney living in Galena. She had another litigation in Mount Carroll with a man, named Mertz, and she also employed Mr. Sheean of Galena to try the Mertz suit for her. The fact, therefore, that, in the important matter of drawing her will, she employed an attorney, living in another town in the same county, and only a short distance from Mount Carroll, is not of itself any indication that the will did not express her own wishes and intentions. It appears, on the contrary, that she was fully consulted as to the provisions of her will, and that the lawyer, who drew it, was fully informed as to her wishes in the matter. It also appears from the evidence that she was a secretive woman, and unwilling to have her neighbors informed about her private business matters. She said that her former agent, Bucher, had been advising her to have a will drawn, and she was afraid that if it was drawn in Mount Carroll and he knew of it, he would annoy her in reference to it. In addition to this, the evidence shows that the provisions of the will correspond exactly with her declarations in reference to the manner of disposing of her property, which she made to others before the drawing of the will. In *Wombacher v. Barthelme*, *supra*, it was said: "The fact, that its provisions corresponded with his declarations as to his intentions, is a circumstance, going to contradict the theory of

fraud or substitution." In the case at bar, the testimony shows that the testatrix, Mrs. Mark, had indicated in conversations with others, which of her nephews and nieces, or foster children, she intended to provide for, and she did provide in her will for those thus mentioned in her conversations with others. The evidence also shows that she frequently spoke of her intention to found a home for old women, who were poor and dependent on others. The provision of the will in reference to this matter corresponds with her expressed intentions upon that subject. Where a will is charged to have been executed through undue influence, the declarations of a testator, made before its execution, are admissible by way of rebuttal to show his intention as to the disposition of his property, upon the ground that a will made in conformity with such declarations is more likely to have been executed without undue influence, than if its terms are contrary to such declarations. The declarations thus admissible are those, which are in harmony with the provisions of the will actually made, and not those which are opposed to such provisions. (*Kaenders v. Montague*, 180 Ill. 300; *Harp v. Parr*, 168 id. 459; *Wombacher v. Barthelme*, *supra*.) Some of the questions, which counsel for plaintiff in error asked the witnesses, and to which objections by counsel for defendants in error were sustained, sought to prove declarations of the testatrix, which were opposed to the provisions of her will, and not in harmony with it; and, therefore, the action of the court in sustaining such objections was not erroneous. It appears that Mr. Sheean, a lawyer in whom the testatrix had great confidence, had advised her to make a will, and told her that she could waive therein the giving of a bond, and suggested to her that, if she wanted him to make the will, he could take memoranda of what she desired home with him to Galena, and there write the will, and send it to her. She, however, subsequently concluded to employ a lawyer living in Savanna, named Wingert, to draw her will for her. We see nothing in the evidence to indicate that the

will thus drawn was not in accordance with her intentions in regard to the disposition of her property.

It is said, however, that there is no evidence in the record showing that she ever read the will, or that the will was read to her. The evidence is clear and conclusive that, when the subscribing witnesses came to her house and witnessed the will, they not only saw her sign it, but she stated to them, in answer to questions, that the document which they were asked to witness was her will. A. G. Jackson, one of the witnesses to the will, and whose testimony is in the record, says: "She spoke and shook hands with me, and said she had requested Mr. McKenney to ask Mr. Rinewalt and myself to come for the purpose of witnessing her signature to her will; saw paper or writing on the table; Mrs. Mark, Mr. Rinewalt, Mr. McKenney and myself were there; Mrs. Mark was sitting in a chair; the paper upon the table I afterwards signed, she said it was her will; I saw her sign it." The other witness, John M. Rinewalt, says: "Mrs. Mark said she asked us to come up for the purpose of witnessing her will; Miss Annie Mark, now Mrs. Tipton, went in and out once or twice; Mrs. Mark took the instrument and wrote her name to the bottom of it; 'Exhibit A' in this case, I believe, is the will that she signed; I saw her sign her name on that date; after she had signed it, I took it, and asked Mrs. Mark, 'Do you declare this to be your last will and testament, and desire us to witness it?' and she said she did; when she signed her name, Mr. Jackson and Mr. McKenney and myself were present; I attached my name as a witness."

In *Sheer v. Sheer*, 159 Ill. 591, we said (p. 594): "The rule of law is, 'where the testator is shown to have executed an instrument as his will, being in his right mind, and there is nothing of fraud or imposition, it will be presumed that he was aware of its contents. The general rule is, that proof of the testator's signature to the will is *prima facie* evidence of his having understandingly executed the same.' As was said in *Sheer v. Sheer*, *supra*, "without attempting to review

the evidence at length, we are satisfied that it cannot be said that it establishes the fact that the testator was, at the time he executed the instrument and requested its attestation by the witnesses, ignorant of its contents and provisions. Where a will is shown to have been prepared at the request of a testator, even under general directions, and is afterwards executed in the manner provided by law, it should not be set aside on the ground that he did not understand what it contained, except upon clear and satisfactory proof of that fact." Here, there is no such clear and satisfactory proof upon this subject.

In the case at bar, there is evidence showing that the testatrix was not unduly influenced by Oscar F. McKenney in the matter of executing her will; and, this being so, the verdict of the jury, who are properly judges of the fact whether there was undue influence or not, will not be disturbed. The proponents of the will upon the trial below furnished *prima facie* proof of the validity of the will, and therefore the burden of proof was upon the contestants to substantiate the charge that the testatrix, when she executed the will, was under the undue influence of Oscar F. McKenney, as charged in the bill. It was incumbent upon the contestants to overcome the *prima facie* case, made by the proponents, by a preponderance of the evidence. This they failed to do. (*Swearingen v. Inman*, 198 Ill. 255; *Webster v. Yorty*, 194 id. 408; *Michael v. Marshall*, 201 id. 70.)

Second—It is claimed by plaintiffs in error that the court below committed error in the admission and exclusion of evidence. It is said that the court erred in sustaining an objection, made by defendants in error to certain questions asked by the plaintiffs in error upon the cross-examination of a certain witness produced by the proponents, named Moffett. No error was committed in this regard, because the questions, to which objections were thus sustained, were not proper cross-examination. Moffett was asked, upon his direct examination, what the testatrix said to him in regard to

the trial of the suit with Ashway. The questions, asked upon cross-examination, were in reference to what she said about her heirs and about making a will. It is clear that the conversations, about which the witness was asked on cross-examination, were not the same as those, about which she was asked upon direct examination. Some of the proponents' witnesses testified as to statements of the testatrix about founding an old ladies' home. The contestants introduced a witness, named Craig, who was asked if, in any of the conversations he had with the testatrix, he heard her say anything about founding an old women's home. This answer was properly stricken out on motion of the proponents, because it was not claimed by anybody, nor shown, that Craig was present at any of the conversations, which the witnesses had with the testatrix about an old women's home, and, therefore, the fact that she never said anything upon that subject to him, could not contradict the proponents' witnesses who said that she had talked about it. Again, it is said that the court improperly struck out the testimony of one Libberton as to statements made to him by the testatrix. Counsel stated that the object of these questions was to show the mental condition of the testatrix, but, as her mental condition was admitted to be that of a person of sound mind and memory, the court properly ruled that no more testimony upon that subject would be heard. Counsel for contestants had repeatedly declared in open court that they admitted that she was of sound mind and memory. Certain questions were asked of a witness named Bucher, the object of which was to show that the testatrix had declared that she intended to leave her property to her heirs. These questions were improper upon the ground that declarations of the testatrix, made previously or subsequently to the execution of a will, cannot be proven in order to invalidate the will. (*Dickie v. Carter*, 42 Ill. 376; *Massey v. Huntington*, 118 id. 80; *Reynolds v. Adams*, 90 id. 134.) "The declarations of a testator or grantor, made before or after the execution of a will or

deed, might be competent evidence to prove mental condition, but such declarations are not competent to show undue influence or fraud." (*Massey v. Huntington*, *supra*). In *Bevelot v. Lestrade*, 153 Ill. 625, we said (p. 631): "It was not error to exclude her [testatrix's] declarations made before the execution of the will, and which were in conflict with its provisions. Such parol declarations cannot be shown to invalidate a will. (*Dickie v. Carter*, 42 Ill. 376). They are sometimes admitted to prove mental condition. (*Massey v. Huntington*, 118 Ill. 80). But they were unnecessary for that purpose here, because it was virtually conceded on both sides that the testatrix was of sound mind when she made her will." So, in the case at bar, as it was conceded that the testatrix was of sound mind when she made her will, it was unnecessary to introduce declarations for the purpose of showing her mental condition. It is furthermore claimed that the court erred in allowing Lewis Browning, husband of one of the devisees, to testify as a witness for proponents. It appears from the record that, after certain questions were asked of this witness, the counsel for the contestants announced to the court that they withdrew their objection to the testimony of Lewis Browning. After the withdrawal of the objections, he was permitted to testify; and, therefore, no error was committed. It is furthermore said that the court refused to allow Libberton, a witness of plaintiffs in error, to testify that the testatrix was a woman easily influenced or susceptible to flattery. No error was committed in this regard, because in *Michael v. Marshall*, 201 Ill. 70, it was said (p. 74): "The first thing in the order of events at the trial, which is made the ground for seeking a reversal of the decree, is, that the court erred in sustaining objections to questions calling for the opinions of witnesses. The questions were as to whether the testatrix was a person easily influenced; as to what influence her uncle and aunt exercised over her; to what extent she had been influenced by her uncle, and to what extent she had been influenced by her

aunt; whether she was afraid of her uncle and other like questions. It is manifest that the court was right in its ruling, since the questions did not call for facts, but for mere opinions and conclusions from facts." So, in the case at bar, the question as to whether the testatrix was easily influenced or was susceptible to flattery called for mere opinions, and conclusions from facts.

Third—It is claimed that the court below erred in reference to the giving and refusal of instructions. The first error assigned is, that the court erred in giving for the defendants in error the fourth instruction. That instruction told the jury that the question of the soundness or unsoundness of the mind and memory of the testatrix was not in the case, it being admitted by the contestants that she was of sound mind and memory at the time of executing the instrument introduced in evidence, and purporting to be her last will and testament; and that, unless the jury believed from the evidence that said instrument was the result of undue influence exercised over the mind of the testatrix by Oscar F. McKenney, then they must find by their verdict that it was the will of Caroline Mark. This instruction was not erroneous under the circumstances of this case. It is clearly shown that counsel for the contestants announced to the court that they did not claim, and would not undertake to prove, that the testatrix was insane or of unsound mind. When one of the witnesses was asked whether in his opinion the testatrix was of sound mind and memory at the time of making the will, one of the counsel for plaintiffs in error arose in court and said: "We make no claim as to her unsoundness of mind, only her testamentary capacity. This is simply a waste of time on the question of sanity. There is no question about that. It is this question of undue influence, to show the party is illiterate, the fiduciary relation, and the fact that she didn't know the contents of this will." It further appears that no witnesses testified that the testatrix was not of sound mind and memory at the time of exe-

cuting the will, and the contestants offered no proof upon that subject. This being so, the instruction was not erroneous. In *Illinois Central Railroad Co. v. King*, 179 Ill. 91, we said: "It is not ground for reversal that an instruction assumes as proven a fact conclusively established by the evidence without contradiction." (*Gerke v. Fancher*, 158 Ill. 375; 11 Ency. of Pl. & Pr. p. 132.) It is said by counsel for plaintiffs in error that some of the defendants below were minors, and, therefore, could not be bound by the admissions of counsel. This is so, but as the testimony showed conclusively that the testatrix was of sound mind, and there was no evidence whatever to contradict it, there was nothing to be submitted to the jury upon this issue, and the court committed no error in so directing them.

It is also claimed that the court erred in giving the thirteenth instruction, which was given for the proponents. That instruction was as follows:

"The jury are instructed as a matter of law that it is not sufficient that the circumstances appearing in evidence attending the execution of the instrument in evidence in this case, purporting to be the last will and testament of the said Caroline Mark, are consistent with the hypothesis of its having been obtained by undue influence; it must be shown that they are inconsistent with a contrary hypothesis. Circumstances which should avail for the proof of fraud are only such as are inconsistent with a contrary view of the transaction."

The language of this instruction is the same as that which appears in section 239 of Schouler on Wills, (2d ed.) and in the case of *Boyse v. Rossborough*, 6 H. L. Cas. 6. In Schouler on Wills, sec. 239, *supra*, it is said: "'In order to set aside the will of a person of sound mind,' observes Lord Cranworth, 'it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence; it must be shown that they are inconsistent with a contrary hypothe-

sis.' And the same holds true where positive fraud or force is the ground of objection. Hence is it that isolated and disconnected circumstances are not permitted to outweigh the usual presumption of the law, that a person of intelligence and capacity, who executes a will, does so without imposition or undue influence."

In connection with the thirteenth instruction it is claimed, on the part of the plaintiffs in error, that the court below erred in refusing to give instructions 19, 20, 21 and 22 asked by plaintiffs in error, the contestants. The instructions thus refused announced the doctrine, in substance, that, if the jury found that confidential relations existed between the testatrix and Oscar F. McKenney, the burden of proof shifted to the proponents to show that the alleged will was the free and voluntary act of the testatrix. It cannot be said that, after proof was introduced showing the relations, which existed between McKenney and the testatrix, the presumption of undue influence was so raised as to shift the burden of proof to the proponents of the will. In *Michael v. Marshall*, 201 Ill. 70, it was said (p. 76): "As a matter of law, the burden of proof in any case is determined by the issues, and it does not shift, but at the end the party, upon whom the burden rests by the pleadings, must have sustained his position by a preponderance of evidence." In the case at bar, under the issue made by the pleadings, the burden of proving undue influence was upon the complainants, who filed the bill below. (*Roe v. Taylor*, 45 Ill. 485; *Webster v. Yorty*, 194 id. 408; *Michael v. Marshall*, 201 id. 70). This burden of proof remained upon the contestants to the end of the trial. In *Weston v. Teufel*, 213 Ill. 291, where it was said that, when proof of a fiduciary relation between the testator and the beneficiary in a will was made, the presumption arose that undue influence induced the execution of the document, and that there was, therefore, imposed upon the proponent the necessity of showing that the execution of the will was the result of free deliberation on the part of the

testator, and of the deliberate exercise of his judgment, and not of imposition or wrong practiced by the trusted beneficiary, it was nevertheless at the same time said: "This, however, does not change the general rule which is, that, upon the whole case, the burden of proof is upon the contestants to establish the undue influence." Where it is said that, when such proof of a fiduciary relation is introduced, the burden of proof is shifted, "all that is meant by this is that there is a necessity of evidence to answer the *prima facie* case or it will prevail, but the burden of maintaining the affirmative of the issue involved in the action is upon the party alleging the fact, which constitutes the issue; and this burden remains throughout the trial." (*Chicago Union Traction Co. v. Mee*, 218 Ill. 9). To have given the instructions asked by the contestants, and which were refused, would have been to tell the jury, that the burden of proof was upon the proponents to show that there was no undue influence. It would have been erroneous to give the jury such instructions, and their refusal was not error.

Complaint is also made that the court erred in giving several other instructions for the proponents, upon the alleged grounds that each of such instructions isolated a certain fact, and told the jury that such fact was not sufficient to overthrow the will. It is said that instructions of this character were condemned in *Weston v. Teufel*, *supra*. We do not think that the instructions complained of are justly subject to the criticism made upon them. For instance, one of these instructions sought to define the degree of influence, which would vitiate the will upon the ground of undue influence, by stating that it must amount to such a degree of restraint and coercion as to destroy the free agency of the testatrix. This was a correct definition of undue influence under the decisions of this court. (*Woodman v. Illinois Trust and Savings Bank*, 211 Ill. 578; *Johnson v. Farrell*, 215 id. 542). In thus defining the general character of undue influence, there was no statement of an isolated fact, which did or did

not constitute undue influence. Two of the instructions complained of called the attention of the jury to the question, whether or not the testatrix, when she signed and executed the will, knew what it contained, and whether or not the testatrix fully understood its provisions. These instructions were not erroneous as calling attention to the ignorance or understanding of the testatrix as an isolated fact, because one of the allegations in the bill was that the testatrix was illiterate, and had no knowledge of the value of her estate, and no understanding of the contents of the will. This allegation as to her ignorance of the contents of the will was additional to the allegations, that she was of unsound mind and memory and the victim of undue influence. In *Swearingin v. Inman*, 198 Ill. 255, we said: "It is insisted that there was ground for invalidating the will in the fact that the testatrix did not know its contents when she signed it. * * * The claim that the testatrix did not know how she disposed of her property is neither the same as, nor consistent with the averment, that she was induced to make a particular disposition of her estate by the undue influence of her husband." (See also *Sheer v. Sheer*, 159 Ill. 591; *Wombacher v. Barthelme*, 194 id. 425). The instruction, therefore, was directed to an independent allegation of the bill, set up as an independent reason for setting aside the probate of the will. Two of the instructions objected to related to facts bearing upon the question, whether or not the testatrix was of sound mind and memory, but as the soundness of her mind and memory was not in dispute or controversy, the instructions upon this subject could have done the contestants no harm. On the contrary, the court at the request of contestants gave to the jury, the following instruction, to-wit:

"The court instructs the jury that, if you believe from the evidence in this case that Caroline Mark was a person so illiterate that she could not read and understand the instrument offered in evidence, and that at the time she signed the same Oscar F. McKenney was her agent, and that she re-

posed special trust and confidence in him, and that said McKenney caused said instrument to be written by an attorney, who was a stranger to Mrs. Mark, and out of her presence, and that said McKenney dictated to said attorney each and every provision of said will, and that said Oscar F. McKenney solicited and procured the attesting witnesses to the said instrument, and that one of said attesting witnesses was his co-partner in the banking business, and that the other of said witnesses was very little acquainted with Mrs. Mark, and that Oscar F. McKenney received a beneficial interest in the alleged will, then, in making up your verdict in this case, you have a right to take into consideration all these facts, if proven, together with the testimony of witnesses and all the other facts and circumstances in evidence in this case, in determining whether the instrument in question was procured by undue influence, as explained in these instructions."

This instruction submitted to the jury all the facts and circumstances, insisted upon by the contestants as showing undue influence over the testatrix by McKenney. The jury found against the contestants upon the question of undue influence, as thus submitted to them. We have held that, where the evidence is conflicting, as it is in the case at bar, upon the question whether the execution of a will was brought about by undue influence, a court of review will not disturb the verdict of a jury, which has been approved by a trial court, unless the verdict is clearly against the weight of the evidence. (*French v. French*, 215 Ill. 470; *Johnson v. Farrell*, 215 id. 542; *Piper v. Andricks*, 209 id. 564; *Spencer v. Spruell*, 196 id. 119; *Kinnah v. Kinnah*, 184 id. 284; *Bevelot v. Lestrade*, 153 id. 625). Here, the verdict of the jury is not, in our opinion, clearly against the weight of the evidence.

Fourth—The defendants in error have filed in this case the record in another proceeding, begun and consummated after the rendition of the final decree, which is here sought to be reviewed. They have also filed an abstract of this addi-

tional record. The final decree, here sought to be reviewed, was entered on March 25, 1902, and an appeal therefrom was prayed and allowed, but not perfected. Subsequently, in June, 1905, the present writ of error was sued out for the purpose of reviewing the decree, so entered on March 25, 1902. Twenty-one months after the final decree was entered on March 25, 1902, a petition was filed in the court below, to-wit, on December 17, 1903, in which a decree was entered on December 18, 1903, relating to a compromise, alleged to have been made of the proceeding for the setting aside of the will of Caroline Mark, deceased, here brought under review. The decree, rendered on December 18, 1903, recites that certain of the petitioners therein, who were parties to the suit to set aside the will, and legatees and devisees under the will, had accepted the bequests and devises made to them, and it also recites that a certain agreement had been entered into between the executors and trustees herein and some of the parties to the suit to contest the will, who are minors acting through a next friend, by the terms of which a certain amount of money was to be paid as a compromise or settlement of the litigation, seeking to set aside the will. It is evident that the record and decree in the compromise suit are separate and distinct from the record and decree in the suit to set aside the will. In the suit to set aside the will, begun on July 13, 1901, and in which the final decree was entered on March 25, 1902, there is nothing in relation to this compromise suit, begun on December 17, 1903, and ended by a decree on December 18, 1903. In the certificate of evidence in the suit to set aside the will nothing is said about the compromise suit thus referred to. It is clear that this additional record cannot be considered by us in this case.

If it was the desire of the defendants in error to bring the subject matter of this additional proceeding to the attention of this court, a plea of release of errors should have been filed, but no such plea has been filed in this case.

In *Kern v. Zink*, 55 Ill. 449, it was held that a release of errors, although presented in writing, signed by the parties in whose name a writ of error was sued out, cannot properly be brought to the notice of the court, except by being pleaded. And we there said: "A paper purporting to be a release of errors, and to be executed by said Peter and Emma, has been filed with the papers in the case, but as the release has not been pleaded, we cannot notice it." In *Trustees of Schools v. Hihler*, 85 Ill. 409, it was held that, if matters are relied on in this court as a release of errors, they must be pleaded, or they will not be regarded; and we there said: "If relied on as operating as a release of errors, counsel should know that, under the well established practice, it should have been pleaded. Releases, and papers operating as such, to be regarded by the court, must be brought to its attention by a regular plea. This is a court of record, and as such, matters of this character must be relied on according to the practice in such tribunals." In *Moore v. Williams*, 132 Ill. 591, we again said (p. 594): "If the reasons of the Appellate Court for dismissing the appeal were based upon facts outside of the record, and occurring after the decree of the circuit court, from which the appeal was taken, had been rendered, it was improper to consider such facts as operating as a release of errors, unless they had been pleaded as such release. * * * Where a party accepts the benefit of a decree, he cannot afterwards prosecute error to reverse it; such acceptance operates as an estoppel and may be treated as a release of errors, but, in an appellate court, matter operating as a release of errors must be set up in a plea to the assignment of errors."

In the case at bar, it appears from the decree rendered on December 18, 1903, in the compromise suit, that certain of the parties to the original litigation had accepted the benefit of the decree below by taking the amounts bequeathed to them under the will. Such acceptance, or the decree finding it to exist, may be regarded as a release of errors, but as such

it should be pleaded. In the present case, this course has not been pursued, and, therefore, the additional record and the abstract of the same are not before us for consideration. (*Trapp v. Off*, 194 Ill. 287; *Thomas v. Negus*, 2 Gilm. 700; *Corwin v. Shoup*, 76 Ill. 246; *Holt v. Reid*, 46 id. 181; *Beardsley v. Smith*, 139 id. 290;) and the cost of the same will be taxed against the defendants in error.

For the reasons above stated, we are of the opinion that the decree of the circuit court was correct; and it is accordingly affirmed.

Decree affirmed.

M. D. HULL

v.

THE SANGAMON RIVER DRAINAGE DISTRICT.

Opinion filed February 21, 1906.

1. DRAINAGE—*grantor of a deed placed in escrow is properly counted as an owner in signing a petition.* A grantor in a deed placed in escrow may properly sign a petition to organize a drainage district under the Levee act, where the deed was not to be delivered until several months after the hearing upon the petition.

2. SAME—*who are properly counted as signers of a drainage petition.* A life tenant and his adult children, representing four-sixths of the remainder combined with the life estate, are properly counted as signers of a petition to organize a drainage district under the Levee act.

3. SAME—*right of commissioners to leave out lands benefited by district.* In a proceeding to organize a drainage district under the Levee act, if the proposed district does not include all the land that will be benefited, the commissioners, under section 12 of the act, may alter the boundaries so as to include such portion of the new lands as will not have the effect of making the signers of the petition less than the number required by the statute, and may leave out the remainder of the new lands even though they will be benefited by the proposed work.

4. SAME—*commissioners under Levee act cannot assess benefits.* The provisions of the Levee act for assessing damages by the commissioners or by a jury being unconstitutional, the commis-

sioners have no power to make an assessment of benefits except where no part of the lands are taken and the owner makes no claim of damages in excess of benefits, since the question of compensation for land taken and damages to land not taken, which must be submitted to a jury in a proceeding under the Eminent Domain act, involves the consideration of special benefits.

APPEAL from the County Court of McLean county; the Hon. ROLLAND A. RUSSELL, Judge, presiding.

RAYBURN & BUCK, for appellant:

The grantee in a warranty deed conveying lands in fee simple, which deed is held in escrow until the day of payment of the consideration of the transfer arrives, is the owner of the lands conveyed, in the contemplation of the Levee Drainage act. *Gudgel v. Kitterman*, 108 Ill. 50; *Redden v. Miller*, 95 id. 336; *Leiter v. Pike*, 127 id. 287; *Thoraldsen v. Hach*, 87 Minn. 168.

The petition to organize the drainage district should have been dismissed for the reason the petition was not signed by the required number of competent land owners. The record in this case does not affirmatively show that the court had jurisdiction to organize the district. 2 Starr & Cur. Stat. par. 30, p. 1501; *Payson v. People*, 175 Ill. 267; *Merritt v. Kewanee*, 175 id. 537.

The statute in pursuance of which the court appointed the commissioners of the alleged drainage district, in lieu of a jury, to make assessments of benefits or damages and benefits is unconstitutional and void, and the order of the court was without authority of law. Const. 1870, art. 2, sec. 13; art. 11, sec. 14; *Railroad Co. v. Drainage District*, 194 Ill. 310; *Juvinall v. Drainage District*, 204 id. 106; *Railroad Co. v. Drainage District*, 215 id. 501.

The commissioners had no authority, acting in lieu of a jury, to spread the assessments appearing in said report. The section of the statute under which they attempted to act in that respect is unconstitutional. 2 Starr & Cur. Stat. sec. 37,

p. 1519; *Railroad Co. v. Drainage District*, 215 Ill. 501; *Mack v. Drainage District*, 216 id. 56.

The commissioners had no power to enlarge the proposed district so as to include a part, only, of the lands they found and reported to the court would be benefited by the proposed improvement. 2 Starr & Cur. Stat. sec. 9, par. 6, and sec. 12, p. 1505.

The appellant was entitled to have the assessment of benefits, or damages and benefits, determined by a legally constituted jury. *Railroad Co. v. Drainage District*, 215 Ill. 501.

The assessment of benefits to appellant's lands by the commissioners, sitting as a jury, without considering the question of damages to appellant's lands not taken, was without authority of law. 2 Starr & Cur. Stat. par. 68, p. 1519, and par. 45, p. 1509; *Pinkstaff v. Drainage District*, 213 Ill. 186.

WIGHT & ALEXANDER, for appellee:

For the purpose of the organization of the district the life tenant in possession and paying taxes is an "owner" of land. *People v. Barnes*, 193 Ill. 620.

Marks Banks was the owner of the fee to the land described as his in the petition, at the time he signed the petition and at the time of the hearing thereon, and his name was properly counted in determining the majority of adult owners. *Railroad Co. v. Hull*, 1 Ill. App. 612; *Furness v. Williams*, 11 Ill. 230; *Price v. Railroad Co.* 34 id. 13; *Demesmey v. Gravelin*, 56 id. 93; *Land Co. v. Peck*, 112 id. 408; *Eichlor v. Holroyd*, 15 Ill. App. 657.

The commissioners may enlarge the boundaries of the district proposed by the petitioners so as to embrace any lands that will be benefited, provided they do not so far enlarge the district as to destroy the petitioner's majority of adult land owners therein situated or the requisite area. Levee act, sec. 12.

The commissioners are required by the statute to find whether or not the district proposed by the petitioners embraces all of the lands that will be benefited, and if not, to report what additional lands will be benefited. Levee act, sec. 9, 5th clause.

The commissioners had full power and authority to make assessments of benefits. It is only the method prescribed by the Levee act for fixing compensation for the lands that are to be taken and damage to the lands not to be taken that is in violation of the constitution of this State. *Briggs v. Drainage District*, 140 Ill. 53; *Railroad Co. v. Drainage District*, 194 id. 310; *Juvinall v. Drainage District*, 204 id. 106; *Railroad Co. v. Drainage District*, 213 id. 83; *Railroad Co. v. Drainage District*, 215 id. 501; Const. 1870, art. 2, sec. 13; *People v. McRoberts*, 62 id. 38.

MR. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

This is an appeal from orders of the county court of McLean county organizing the Sangamon River Drainage District, in said county, and confirming an assessment of benefits against appellant's lands by the commissioners of said district. The proceeding was commenced by filing a petition for the organization of the district under what is commonly known as the Levee act. (2 Starr & Cur. Stat. 1500.) Commissioners were appointed by the court, and they examined the lands proposed to be drained and over and upon which the work was proposed to be constructed, and made a report, as required by section 9 of the act, recommending the organization of the district. Appellant filed objections to the report and his objections were overruled.

It is first contended that the court erred in overruling the objections and in not dismissing the petition, for the reason that it was not signed by a majority of the adult owners of the land within the district and who represented one-third in area of the lands to be reclaimed or benefited. The petition

was signed in the summer of 1903 and the hearing was in the fall of that year, and Marks Banks, one of the signers, was counted by the court as the owner of one hundred and sixty acres of land. He had previously signed and acknowledged a deed of the land to Harrison Frink and Sheridan J. Frink, and had deposited the deed in the First National Bank of Bloomington, to be delivered on payment of the purchase price on or before February 15, 1904, and in case of such payment he was to deliver possession on or before March 1, 1904. The deed placed in escrow conveyed nothing until the conditions for its delivery were performed on February 15, 1904, when it was delivered to the grantees. (*Leiter v. Pike*, 127 Ill. 287.) The title did not pass out of Marks Banks until the deed took effect and the grantees became the owner of the land, and he was properly counted as an owner.

There was an eighty-acre tract which had belonged to James R. Cundiff, who had died leaving a widow, Sarah Cundiff, and an only son, Isaac. By his will James R. Cundiff devised said land to his widow for life, and she died before the petition was signed. After her death the land was devised to the son, Isaac Cundiff, for life, with remainder in fee at his death to his children who should be living at that time, and if any child of Isaac should die in his lifetime leaving a child or children, such child or children who might be living at the time of Isaac's death was to have the share that would have gone to the parent. Isaac Cundiff had six children, of whom four were adults and two were minors. He and the adult children signed the petition. We do not care to construe the will in this collateral way, since, in any view of its provisions, the petition was sufficient. Isaac Cundiff, who signed the petition, had a life estate in the land and was also the only heir-at-law of the testator, and if his children had no present estate, the fee after the life estate was in him as heir-at-law to await the contingency upon which the remainder was to vest; and if the children had a present estate, the adults who signed the petition rep-

resented four-sixths of the remainder combined with the life estate. The petition fulfilled the requirements of the statute.

The commissioners reported that the proposed district did not embrace all the lands that would be benefited, and that a very large area of additional lands, of which they gave the descriptions and names of the owners, would be benefited. They enlarged the district so as to include part of the lands, which would not have the effect of so far enlarging the district that the petitioners would no longer constitute a majority of the adult land owners nor represent less than one-third of its area, but they did not include 4248 acres which would be benefited by the proposed work, for the reason that there would not be the requisite number of petitioners. Appellant contends that the petitioners had no power to enlarge the district by including a part, only, of the lands that would be benefited, and that the court had no right to organize a district including less than all the lands that would be so benefited. Section 12 of the act authorizes the commissioners to alter the boundaries by extending or contracting them so as to include lands that will be benefited and exclude lands that will not be benefited, provided that the alteration of the boundaries shall not have the effect of so far enlarging or contracting the district that the petitioners will not any longer constitute a majority of the adult land owners of the land therein situated or represent one-third of the area. The change in the boundary of this district was in accordance with that statute. The proviso to section 12 fixed a limit beyond which the commissioners could not go in enlarging the district, and the court did not err in overruling the objection.

Appellant owned two hundred acres of land in the district and the proposed ditch was to run across his land, so that a part would be actually taken for the ditch. The court directed the commissioners to go upon the lands of the district and make assessments of benefits and damages, or benefits, in the manner provided by law and to make a report to the court. The commissioners took an oath that they would,

to the best of their ability, make assessments of damages and benefits, or benefits, as the case might be, and made a report, accompanied by an assessment roll, in which they assessed against a forty-acre tract of appellant \$83.40 and against a tract of one hundred and sixty acres \$551.12 for benefits. The commissioners reported that they had disregarded all damages that would be sustained by the lands, both damages to land that would be taken and damages to land that would not be taken, because they had been advised that they had no right, power or authority, under the law, to fix damages or award compensation, but that it was their intention, after the assessment of benefits had been confirmed, to begin proceedings under the Eminent Domain act to condemn the right of way over the lands of owners with whom they could not agree. Appellant objected to the assessment, specifying as the principal ground that the commissioners had no power or authority to make the assessment, but his objections were overruled. The commissioners then sat as a jury by direction of the court, against the objection of the appellant, for the hearing of objections, and rendered a verdict confirming their assessment as made, without modification, amendment or correction.

It is conceded that the commissioners had no power to assess damages, and they so stated in their report; but it is contended that they could assess benefits to appellant's lands and try the question of compensation and damages before a jury,—or, in other words, that they could try the part of a condemnation case involving benefits and have a jury try the other part involving damages, and have two verdicts. The provisions of this Drainage act for assessing damages by a jury or commissioners are unconstitutional and void. (*Michigan Central Railroad Co. v. Spring Creek Drainage District*, 215 Ill. 501.) The compensation to be paid for land actually taken and damages to lands not taken can only be determined by a jury. When a jury is empaneled for that purpose, after ascertaining the just compensation for land

taken they can only determine whether there is any damage to the lands not taken, or how much the damage is, by taking into account special benefits to the land. On the question of damages to lands not taken the jury would be bound to consider the effect of the improvement upon the land, both advantages and disadvantages, and for the purpose of reducing or balancing damages would necessarily take into account any special benefits. That is not assessing benefits to the land, but is merely ascertaining whether there is damage or not. (*Page v. Chicago, Milwaukee and St. Paul Railway Co.* 70 Ill. 324.) Where commissioners set down damages and benefits and carry the balance forward as damages or benefits, the only final conclusion is that there are damages or are benefits, and the figures only show how the result was arrived at. Manifestly, the commissioners cannot supplant a jury in the determination of one of the questions which is necessarily involved in a proceeding under the Eminent Domain act. If commissioners can make an assessment of benefits to lands a part of which is taken for a public improvement, they can finally and conclusively determine a question which the owner has a constitutional right to have submitted to a jury. As to lands no part of which is taken, if the owner makes no claim of damages in excess of benefits the commissioners may assess such benefits, and if a jury in an eminent domain proceeding has found that there were no damages to the remainder of the land, the verdict would not be conclusive that there were no benefits. (*City of Chicago v. Mecartney*, 216 Ill. 377.) In this case the commissioners, under the orders of the court and against the objection of appellant, attempted to determine a question which appellant had a right to have submitted to a jury. The court erred in overruling the objections of appellant to such proceeding.

The judgment is reversed and the cause remanded.

Reversed and remanded.

ELMORE E. SUTTON

v.

JOSEPH MILLER *et al.**Opinion filed February 21, 1906.*

1. SPECIFIC PERFORMANCE—*specific performance is not a matter of right, irrespective of equities.* Specific performance of a contract will not be decreed if there is anything which makes it inequitable, from a change of circumstances or otherwise, that the complainant should have his contract performed.

2. SAME—*when specific performance is properly denied.* Specific performance of a contract to convey land is properly denied when the complainant refused to accept the abstract of title tendered, and, after several attempts by the defendant to correct the alleged defects, notified the defendant that he would not accept a conveyance and demanded payment of the amount agreed upon to be forfeited, in reliance upon which notice and demand the defendant re-possessed himself of the premises and remained in possession two months before the bill was filed.

WRIT OF ERROR to the Circuit Court of Shelby county;
the Hon. TRUMAN E. AMES, Judge, presiding.

CHAFEE & CHEW, for plaintiff in error.

R. M. PEADRO, for defendants in error.

Mr. JUSTICE BOGGS delivered the opinion of the court:

On the first day of May, 1903, the plaintiff in error filed his bill in chancery in the circuit court of Shelby county against the defendants in error to compel the said defendants in error to specifically perform a contract alleged to have been entered into between the parties to this appeal for the conveyance of certain real estate in said Shelby county. Demurrers were filed to the bill by both of the defendants in error, which were overruled, and the defendant in error Mary Miller electing to stand by her demurrer, a decree *pro confesso* was entered as to her. The defendant in error Joseph Miller answered the bill, and upon a hearing before

the court a decree was entered dismissing the bill for want of equity. A writ of error sued out of this court brings the record before us for review.

Briefly stated, the facts are as follows: On the 4th day of June, 1902, a written contract for the sale of a certain eighty-acre tract of land in Shelby county by the defendant in error Joseph Miller to the plaintiff in error for the sum of \$6800 was entered into, which provided that \$300 should be paid at the date of signing the contract; that the plaintiff in error should be entitled to the possession of the premises on or before the 15th day of June, 1902, and have the rents for that year; that an abstract should be furnished on or before the 20th of February, 1903, showing "salable title," and that a warranty deed should be tendered March 3, 1903, at which time the remainder of the purchase money should be paid. The agreement provided for a forfeiture of the sum of \$1000 by the party to the agreement who should fail or refuse to comply with the same, which said sum of \$1000 was declared to be liquidated damages. The title to the property was not in the defendant in error Joseph Miller, but it was in his wife, Mary Miller, his co-defendant in error. The proof showed that the plaintiff in error paid the \$300 at the time the contract was signed and received possession of the premises shortly thereafter, and that he received the rents for the year 1902, amounting to about \$485. Within the time specified in the contract the defendant in error Joseph Miller submitted an abstract of title for the examination of the attorney for the plaintiff in error, and at the same time exhibited to the plaintiff in error a deed executed by himself and wife conveying the land to the plaintiff in error, which deed he proposed to deliver on payment of the purchase money. Many objections were found to the abstract and different attempts were made to correct the alleged deficiencies in the title. On February 24, 1903, the attorney for the plaintiff in error wrote to the defendant in error Joseph Miller a letter reciting various objections to

the title as shown by the abstract, and concluded as follows: "In view of all this, Mr. Sutton directs me to say that he cannot accept conveyance and pay you the money, but rather than have his money tied up in uncertainties you may pay to him the \$1000 forfeit provided in the agreement. Giving you credit on this for \$185 received for rent in excess of the money he paid you, will leave a balance of \$815. You may send a draft for that amount to me here, or direct to him, if you prefer, and I will see to it that he prepares and there is sent to you a proper release and satisfaction from all further liability under the contract." Prior to the writing of this letter the defendants in error had delivered to the attorney for the plaintiff in error several deeds in the chain of title to the land, and on the next day after the above quoted letter was written, the attorney for the plaintiff in error returned these deeds to the defendants in error, accompanied by a note saying, "they do not fill the requirements as indicated in my letter written yesterday and my previous letters." When these deeds and this letter were received the defendant in error Joseph Miller went to a Mr. Kidwell, who had contracted with Sutton, the plaintiff in error, to farm the land for the coming season, and notified Kidwell to turn over the land to him on the 5th day of March, and also notified Kidwell not to go upon the land. Kidwell complied, and defendant in error entered into possession of the land about March 5, 1903. He seems to have remained in possession without objection for more than two months, and then this bill was filed asking the court to compel the defendants in error to make conveyance of the land to the plaintiff in error.

A decree for the specific performance of a contract for the sale of land is not a matter of right, but a bill for the specific performance of such a contract is addressed to the sound legal discretion of the court, and the court will be governed, to a great extent, by the facts and circumstances of each particular case. (*Harrison v. Polar Star Lodge*, 116 Ill. 279; *McDonald v. Minnick*, 147 id. 651.) The plaintiff

in error, after having received the abstracts tendered by the defendants in error, made many objections thereto, and after several attempts by the defendants in error to cure the alleged defects in the title to the property, he directed his attorney to write the defendants in error that he would not accept the conveyance or pay the money therefor, and ordered his attorney to demand payment of the \$1000 stipulated in the contract as liquidated damages, authorizing him to give credit for the rents collected by the plaintiff in error while in possession under the contract, which left a balance of \$815, and he demanded that sum should be paid to him. These directions were complied with by the attorney for the plaintiff in error, and the defendants in error, relying on these letters as an election by the plaintiff in error to abide his remedy at law to recover the \$1000 named in the agreement as damages and as a release of any claim he might have for a conveyance of the land, re-entered into possession of the land and proceeded to deal with it as their own, without objection on the part of the plaintiff in error, so far as the record discloses, until the bill was filed. The defendants in error were justified in believing that no further claim of a right to a conveyance of the land would be made,—in fact that the plaintiff in error would not accept such title as the defendants in error were able to convey, but had elected to resort to his claim for damages.

Specific performance of a contract is a matter resting in the sound discretion of the chancellor, and will not be enforced if there is anything that makes it unconscionable, from a change of circumstances or otherwise, that the party should have execution of his agreement. *Taylor v. Merrill*, 55 Ill. 52; *East St. Louis Connecting Railway Co. v. City of East St. Louis*, 182 id. 433.

In view of the circumstances disclosed by this record the chancellor did not err in dismissing the bill for want of equity. The decree will therefore be affirmed.

Decree affirmed.

, FRANK KONSER

v.

JOHAN KONSER.

Opinion filed February 21, 1906.

DEEDS—*what evidence overcomes presumption of delivery of deed.* Evidence that a deed from the grantor to his son was intended to become effective after the grantor's death, and that the grantor recorded the deed but kept it in his possession and paid the taxes on the property; that he had no other property than that conveyed yet reserved no interest therein, and that he kept the deed until it was taken by the grantee in the grantor's absence and kept by him though the grantor demanded its return, overcomes the presumption of delivery of the deed arising from the fact that it was recorded and was in the possession of the grantee.

APPEAL from the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding.

This is an appeal from a decree of the superior court of Cook county setting aside and canceling a deed made by the appellee to appellant and declaring the same to be a cloud upon the title of appellee.

From the evidence it appears that appellee, who was the father of appellant, is a German and was about the age of fifty-five years at the time of the transaction, unable to read or speak the English language and uneducated in his own language, and by occupation a day laborer; that he had acquired title to eighty-two feet of land in the city of Blue Island, Illinois, and that upon forty-one feet thereof was a house occupied by himself and family as a homestead; that said real estate constituted his entire property, and that he had two children, appellant and an older daughter. Upon the marriage of the daughter he had deeded to her the unimproved half, or forty-one feet, of said real estate. Appellant lived with appellee at the time of making said deed, and later married and for a time continued to live at home. At about

the time of appellant's marriage a cottage was constructed on the rear of the premises in question, and when completed appellant moved into it, and he and appellee were living on the lot described in the deed, in their separate homes, at the time of commencing this suit. Appellee testified that after making the deed to his daughter, appellant was insistent that the balance of said premises be given to him, and finally he yielded to the importunities of appellant and called at the office of John L. Zacharias, a banker and notary public in Blue Island, for the purpose of having a deed drawn; that he was accompanied by appellant; that he instructed Zacharias to make out "papers" giving appellant said lot, but not until after his death; that he wanted appellant to have the lot when he and his wife were dead; that Zacharias drew the deed and instructed him not to deliver it to appellant or allow it out of his possession; that he kept it until the month of May, 1901, when appellant represented to him that unless the deed was recorded it would not be effective and he would get nothing on appellee's death; that appellant and his wife read the deed to him, and stated that he and his wife would have the use of the property for their lives even though the deed was recorded; that his son stated in the event the deed was not filed for record he would kill himself or go away and leave his wife and children for appellee to support; that finally appellee consented to have the deed recorded, and, accompanied by appellant, took the deed to a friend, one Beer, and requested him to take the deed to Chicago for the purpose of filing it for record; that when he delivered the deed to Beer he stated to him that his intention was, so long as he and his wife lived that the deed was not to be effective; that after the deed was recorded it was returned to him by Beer and he paid the recording fee; that he put it in the bureau drawer in his home; that the deed thereafter remained in his possession; that he often saw it in the drawer among his papers, and that the last time he saw it was just before going to Bernice after his first wife's death; that on his return he

missed the deed; that he accused his son of having the deed, and stated to appellant that he knew that Zacharias had instructed him not to give up possession of the deed, and that appellant replied that the deed was his,—that his name was on it. Appellee testified that he caused a house to be erected on the rear of the lot described in the deed, for which he paid, and which was occupied by appellant and family, and for which appellant paid rent until the death of appellee's first wife, at the rate of \$8 per month; that the property covered by the deed constituted his entire estate; that he had paid the taxes thereon, except for the year just prior to the bringing of this suit, and at that time he was not at home and that appellant paid them; that he never delivered the deed to appellant or anyone for him, and that no consideration was paid to him by appellant for the lot.

Appellant contradicts appellee on every material statement. He testified he never asked appellee to make him a deed to the premises; that appellee suggested that they go to Zacharias and have the deed made; that as soon as the deed was signed it was delivered to him, and that he had it in his possession until the date of taking the same to Beer for the purpose of having it recorded; that appellee suggested that the deed be recorded; that he and appellee went to Beer's house for that purpose; that just before they reached the house he turned the deed over to appellee, and that after the deed had been recorded it was returned to the appellant by Beer and that he paid the recording fee; that he had had possession of the deed from that time until the trial; that he never paid appellee rent, and that he paid for the cottage erected on the rear of the lot; that appellee paid the taxes on the premises for the purpose of assisting him, and not under claim of ownership; that after the delivery of the deed to him appellee never claimed to own the lot, nor did he exercise dominion thereover; that appellee always stated he had no interest therein and that it was the property of the appellant.

Zacharias, the notary public who drew the deed, testified that appellee and his son called upon him, and that the appellee stated to him that he desired to have "papers" drawn so that appellant, after his death, would get all of his property; that he had already given to his daughter all that he believed she was entitled to; that he inquired if appellee desired to make a will, and that appellee stated that he wished the matter fixed by deed; that he said he understood that the house he lived in and the new house then being erected in the rear would be his so long as he lived; that witness then advised appellee that if he delivered the deed to appellant title would immediately vest, and that appellee should arrange with someone in whom he had confidence to keep the deed until after his death and then deliver it to appellee, or to be very careful not to deliver it to appellant; that the appellee stated, in reply to this advice: "All right, we will fix it that way; you make out the deed; Frank is a good boy and he and I will have no trouble."

Henry J. Beer testified that shortly prior to the date the deed was recorded, May 13, 1901, appellee and appellant called at his house, and that appellee stated to him that he would like to have him take a deed to Chicago and file the same for record, and, in substance, that he wanted his son to have the property after his death; that his daughter had already received all she was entitled to; that Frank was a good boy and he had given him that deed; that the appellee then had possession of the deed, and after the deed was recorded witness returned the deed to appellee and appellee paid the recording fee.

The contractor and sub-contractors who did the work on the cottage in the rear of appellee's homestead testified that appellee made the contract, and that appellee or his wife paid them for their work upon the cottage as it was in the course of construction.

Clara Nicht (now appellee's step-daughter) testified that she heard a conversation between appellee and the appellant

which took place shortly after appellee discovered that his deed was not in the bureau drawer; that appellee accused appellant of having taken the deed and demanded its return, and that appellant attempted to justify his conduct in taking the deed by claiming that he was the owner of the deed because his name appeared thereon; that appellee stated that he had been told he must keep the deed, and if he did not return the deed to him he would sue him, and appellant replied, "If you do, I will leave my wife and children with you and go away."

Three witnesses testified on behalf of appellant that they had heard appellee state that he had given the property to appellant. One of these witnesses, a saloon-keeper, testified that appellee, while drinking at his bar with appellant, stated that he now had everything fixed; that Bertha had her share and Frank (appellant) would get the rest of his property, and that appellant then showed him a warranty deed.

A number of receipts were introduced in evidence signed by the contractor and sub-contractors for work on the cottage, made out in appellant's name.

The testimony further shows that some time after the execution of this deed, appellee's wife, the mother of the appellant, died, and about four months subsequent to her death appellee re-married. Prior to his second marriage he went to Bernice and left his home in charge of appellant and his wife; that upon his return he brought with him a housekeeper, whom he afterwards married, and whose daughter is the witness Clara Nicht, above referred to. A few months after his second marriage appellee filed of record a declaration to the effect that the deed of record and in appellant's possession had not been delivered and was not intended to become effective until after appellee's death. Appellant then filed the original bill in this case seeking to have said declaration declared a cloud upon his title. Appellee appeared and answered, and filed a cross-bill asking to have said deed set aside and declared a cloud upon his title. The

master's findings were in favor of appellant but were overruled by the chancellor, and a decree granting the relief prayed for in the cross-bill was entered. The case has been brought here on appeal, for the purpose of reviewing the action of the trial court in entering such decree.

MASON & WYMAN, for appellant.

ANTON W. SCHROETER, and JOSEPH P. EAMES, for appellee.

Mr. JUSTICE HAND delivered the opinion of the court:

The decision of this case turns upon the question whether the deed from appellee to appellant was delivered, and the determination of that question necessitates an examination of the evidence for the purpose of ascertaining with what intention appellee made the deed.

The question of delivery, as between the parties to a deed, is one of intention. This court has frequently held that the recording of a deed is *prima facie* evidence of its delivery, (*Valter v. Blavka*, 195 Ill. 610,) and that although the recording of a deed of itself is not, in law, a delivery of it, yet where it appears that the grantee in the deed has knowledge of the recording of the deed and has assented thereto, and where a recorded deed is subsequently found in the possession of the grantee, such fact amounts to *prima facie* evidence of delivery. (*Shields v. Bush*, 189 Ill. 534.) However, the *prima facie* evidence of delivery made by proof of recording and possession of a deed by the grantee may be rebutted and overcome by testimony which establishes that the grantor in fact did not intend to deliver the deed and have it become at once effective as a conveyance. *Valter v. Blavka*, *supra*; *Union Mutual Ins. Co. v. Campbell*, 95 Ill. 267.

The circumstances surrounding this transaction from the date of the drawing of the deed until the commencement of

this suit are fully set forth in the statement of facts preceding this opinion and need not be reiterated at this time. From the evidence it seems clear that appellee, at the time of calling upon Zacharias, had in mind the disposition of his property after his death. He had heard of the costs of probating a will and desired to save costs, and asked that a deed be made. He was at that time advised as to the effect of delivery, and instructed to either retain possession of or deposit the deed with some friend in whom he had confidence, to be held until his death and then delivered, and he stated that he would follow such advice. Nothing said or done at the time of making the deed, as shown by the testimony of appellee and Zacharias, indicated any intention on the part of appellee to have the transfer become presently effective, but the clearly expressed intention of appellee was to so arrange his estate that appellant would get it all upon his death, he having already given his daughter all that he felt she was entitled to. The facts and circumstances do not corroborate appellant's statement that the deed was at once delivered to him, but preponderate in favor of the statement of appellee that he retained it in his possession from the time it was signed until he gave it to Beer to be taken to Chicago and filed for record. At the time appellee delivered the deed to Beer for the purpose of having it recorded he substantially reiterated the statement he had made to Zacharias as to his intention in making the deed.

As to the possession of the deed after it had been recorded, and thereafter, appellant is again contradicted by a disinterested witness, and appellee's statement of the fact is corroborated. Beer testifies positively that he returned the deed to appellee and that appellee paid him the recording fee, and that appellant was not present at the time he returned the deed to appellee. As appellant claims possession of the deed subsequent to its recording from its delivery to him by Beer, and nowhere claims to have received the deed from appellee or from any other source than from Beer, and

as Beer, a wholly disinterested witness, positively states he did not return the deed to appellant but did give it to the appellee, the evidence preponderates in favor of appellee's contention that the deed remained in his possession until he left his home; and strongly corroborating this proposition is the fact that immediately upon his return, when appellee discovered that the deed was not in his bureau drawer, he at once charged appellant with having abstracted it during his absence, and appellant made no denial, but attempted to justify by claiming the deed belonged to him. It is not denied, and is clearly established by the evidence, that the property described in the deed represented the entire estate of the appellee, and that it was occupied by himself and family at the time of making the deed, as his home. Appellant testified that the deed was intended as a gift of said lot without reservation and intended to become at once effective, and it does not seem probable that appellee would give to this son, then a man of but twenty-three years of age, of no business experience and just starting out for himself in life, his entire estate without the reservation of a life estate or even an agreement as to support or occupancy during life, making it possible for appellant to dispossess him, as was attempted here, at any time; and these are facts that must be given due consideration in reaching a conclusion as to appellee's intention. *Wilenou v. Handlon*, 207 Ill. 104; *Dorman v. Dorman*, 187 id. 154.

We are of the opinion that the clear preponderance of the evidence is against appellant's contention, and that the intention of appellee was to dispose of his property so that his daughter should receive nothing more and that the title to this real estate would vest in appellant after his death. The deed was intended to operate as a will, and not as a deed, and, there being no question of estoppel here, would, as to appellant, be wholly inoperative. (*Wilenou v. Handlon*, *supra*.) The fact that appellee stated to different persons that he had made a deed to the lot to appellant is not

inconsistent with the view that he intended the deed to take effect only upon his death.

The decree of the superior court will therefore be affirmed.

Decree affirmed.

HENRI VINCENTEAU

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Opinion filed February 21, 1906.

1. **TRADE-MARKS**—*act of 1895 applies to labels or trade-marks on bottled goods.* Section 2 of the Trade-mark act, as amended in 1895, (Laws of 1895, p. 320,) covers goods, wares and merchandise of every description, no matter how packed or in what contained, to which or upon which any counterfeit label or trade-mark is in any manner attached, including bottled goods as well as others.

2. **SAME**—*prosecution for violating Trade-mark act cannot be maintained unless label or trade-mark is recorded.* A prosecution for violation of the Trade-mark act of 1895 cannot be maintained except for acts done after copies of the label, trade-mark or other device, with the accompanying affidavit, have been filed with the Secretary of State for record, as required by section 3 of such act.

3. **INDICTMENT**—*when indictment for violating Trade-mark act is not defective.* An indictment for violating the Trade-mark act of 1895, which alleges that the labels in question had before then "been duly filed for record in the office of the Secretary of State of the State of Illinois, as by law provided," is not defective in failing to specifically aver that the affidavit required by section 3 of such act to accompany the labels was filed.

4. **CRIMINAL LAW**—*whether person to whom counterfeit goods were sold purchased for himself or as an agent is not material.* Whether the person to whom the accused sold goods in bottles bearing counterfeit labels, purchased the goods for himself or as agent is not material, and there is no variance between an allegation that he purchased for himself and proof that he purchased as an agent.

5. **SAME**—*when exclusion of evidence is error.* One indicted for selling cases of counterfeit champagne which he claims he took from another person in satisfaction of a debt, believing the labels

and liquor to be genuine, is entitled to show by the expressman who delivered the cases that said expressman had at an earlier date brought such cases to the accused from the place of business of the person from whom the accused claims to have received them.

6. NAMES—*when names are not idem sonans.* The name Matt Von Guaita and the name Max Von Guaita are not *idem sonans*.

7. SAME—*when instruction as to doctrine of idem sonans is misleading.* Where there is a conflict in the evidence as to whether the name "Matt" alleged in the indictment is "Matt" or "Max," an instruction for the People stating that the doctrine of *idem sonans* applies in this State, and that the "law does not favor *extreme technicality* in regard to proof of name where the sound of the names is very similar," is erroneous and misleading.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on writ of error to the Criminal Court of Cook county; the Hon. JESSE HOLDOM, Judge, presiding.

This is an indictment found by the grand jury of Cook county at the November term, 1903, of the criminal court of Cook county against the plaintiff in error, based upon sections 1 and 2 of chapter 140, (Hurd's Rev. Stat. of 1903,) being "An act to protect associations, unions of workmen and persons in their labels, trade-marks and forms of advertising," approved May 8, 1891, in force July 1, 1891. (Laws of 1891, p. 202.) A plea of not guilty was interposed, and upon the trial the jury returned a verdict finding plaintiff in error, Henri Vincendeau, "guilty of knowingly selling goods, wares and merchandise with counterfeit labels attached in manner and form as charged in the indictment." Motions for new trial and in arrest of judgment were made and overruled and judgment of conviction was entered against the plaintiff in error, sentencing him to an imprisonment of three months in the county jail and to pay the costs of suit. A writ of error was sued out from the Appellate Court for the purpose of reviewing this judgment of conviction, and the Appellate Court has affirmed the judgment. The present writ

of error is sued out from this court for the purpose of reviewing the judgment of affirmance so entered by the Appellate Court.

The indictment consists of two counts. The first count charges that plaintiff in error, on October 15, 1903, in Cook county, Illinois, "unlawfully did sell to one Otto Schmidt certain goods, wares and merchandise, to-wit, twenty-four bottles, each bottle then and there containing certain liquid then and there resembling champagne wine, a more particular description of which said liquid is to said jurors unknown, to each of which said bottles there was then and there attached and affixed a certain counterfeit and imitation label, as he, the said H. Vincendeau, then well knew, which said counterfeit and imitation label then and there was and is in the words and figures as follows, to-wit:

"G. H. MUMM & CO.

(Figure of Eagle)

EXTRA DRY

G. H. MUMM & CO.,

REIMS, FRANCE

Trade-mark No. 9780, Registered 7th

Novr., 1882.

F. de BARY & Co., NEW YORK

Sole Agents for the U. S.'

which said counterfeit labels were then and there counterfeits and imitations of the certain labels theretofore adopted and used and then and there being used by one Peter Herman Mumm, one Matt Von Guaita, one Herman Von Mumm, partners then and there doing business as G. H. Mumm & Co., which said labels so adopted and used as aforesaid by said co-partnership were so adopted and used as aforesaid for the purpose of designating, making known and distinguishing certain goods, wares and merchandise and other products of labor as having been made, manufactured, produced, prepared, packed and put on sale by said Peter Herman Mumm, said Matt Von Guaita and said Herman Von Mumm, partners doing business as aforesaid, which said labels so adopted and used and being used as aforesaid by said co-partnership, as aforesaid, before then duly filed for

record in the office of the Secretary of State of the said State of Illinois, as by law provided."

The second count seems to be the same as the first, with the exception that the design or device charged to have been counterfeited or imitated is called a trade-mark as well as a label. That is to say, it is designated as a label only in the first count, but is described as a label and trade-mark in the second count.

ELIJAH N. ZOLINE, for plaintiff in error:

The Trade-mark act, under which this prosecution is based, does not apply to labels or trade-marks on bottles, but has merely reference to goods contained in any box, case, can or package. Rev. Stat. chap. 140, sec. 2.

Penal statutes must be strictly construed, and cannot be extended by implication.

The indictment is a nullity because it fails to show affirmatively that the owner of the label has fully complied with the provision of section 3 of the act, which provides that a certain detailed sworn statement must be first filed by the party claiming to own the label as a condition precedent to a valid registration. *State v. Barnett*, 159 Ind. 432; *Curtis v. Bradley*, 75 Ill. 180.

The omission of a single particular fact essential to constitute an offense cannot be supplied by any intendment or implication whatsoever, and renders the indictment bad at any stage of the proceedings. 1 Bishop on New Crim. Proc. secs. 98a, 325; *Pettibone v. United States*, 148 U. S. 197; *Queen v. Daniels*, Holt, 346; *Regina v. Gibbs*, 8 Mod. 58; *Commonwealth v. Dudley*, 6 Leigh, 613.

If a statute does not set forth all the elements necessary to constitute the offense intended to be punished, an indictment which simply follows the words of the statute is not sufficient. It must, in such case, go further, and allege with certainty all of the particular facts necessary to bring the case within the intent and meaning of the statute. If the statute

simply names the offense and provides for its punishment, or defines a crime by its legal results, an indictment which simply follows the words of the statute is not sufficient. It must go further and state the facts whence the result comes. *State v. Howard*, 34 L. R. A. 178; *United States v. Cruikshank*, 92 U. S. 558; *United States v. Simmons*, 96 id. 360; *United States v. Carl*, 105 id. 611; *Evans v. United States*, 153 id. 584; *State v. Carpenter*, 54 Vt. 551; *Schmidt v. State*, 78 Ind. 41; 1 Bishop on New Crim. Proc. secs. 626, 628, 629.

This is particularly true where the statute creates a new offense. *Johnson v. People*, 113 Ill. 99.

Where the matter, whether introductory or otherwise, is descriptive, it must be proved as laid or the variance will be fatal. Where a person or a thing necessary to be mentioned in an indictment is described with unnecessary particularity all the circumstances of the description must be proved, for they are all made essential to identity. Redfield on Evidence, (12th ed.) sec. 65.

The statute here involved does not cover counterfeit or imitation goods, but goods sold with imitation or counterfeit labels, which are not the facts proven in this case.

W. H. STEAD, Attorney General, JOHN J. HEALY, State's Attorney, (ROBERT M. HOLT, of counsel,) for the People:

On the question of *idem sonans* the law does not favor extreme technicality in regard to proof of name where the sound of names is very similar. *McDonald v. People*, 47 Ill. 533; *Belton v. Fisher*, 44 id. 32; *Rivard v. Gardner*, 35 id. 125; *Chiniquy v. Catholic Bishop*, 41 id. 148; *Dickinson v. Bowes*, 16 East. 110.

A court of appeals will not reverse a case upon instructions where the record fails to show all of the instructions that were given to the jury upon the trial of the case. *Pratt v. Gas Light Co.* 155 Ill. 531; *Roodhouse v. Christian*, 158 id. 137.

Where the statute seeks to punish the offense of selling, independent of and regardless of the party to whom the selling is made, then the indictment need not allege the name of the purchaser. *Cannady v. People*, 17 Ill. 158; *Rice v. People*, 38 id. 435; *Myers v. People*, 67 id. 503.

Mr. JUSTICE SCOTT delivered the opinion of the court:

The sufficiency of the indictment is questioned.

Section 1 of chapter 140 (Hurd's Rev. Stat. of 1903,) provides, in substance, that it shall be unlawful to counterfeit or imitate any trade-mark, label or other device of like character, adopted or used by any person or any association or union of workingmen. Section 2 of that act denounces the offense which the defendant in error avers is charged by the indictment. That section is in words and figures following:

"Whoever counterfeits or imitates any such label, trade-mark, term, design, device or form of advertisement, or sells, offers for sale or in any way utters or circulates any counterfeit or imitation of any such label, trade-mark, term, design, device or form of advertisement, or knowingly uses any such counterfeit or imitation, or *knowingly sells or disposes of or keeps or has in his possession, with intent that the same shall be sold or disposed of, any goods, wares, merchandise, or other product of labor to which any such counterfeit or imitation is attached or affixed, or on which any such counterfeit or imitation is printed, painted, stamped or impressed,* or knowingly sells or disposes of any goods, wares, merchandise or other product of labor contained in any box, case, can or package to which or on which any such counterfeit or imitation is attached, affixed, printed, painted, stamped or impressed or keeps or has in his possession with intent that the same shall be sold or disposed of, any goods, wares, merchandise or other product of labor in any box, case, can or package to which or on which any such counterfeit or imitation is attached, affixed, printed, painted, stamped or impressed, shall be punished by a fine of not less than one

hundred (100) dollars, nor more than two hundred (200) dollars, or by imprisonment for not less than three (3) months nor more than one (1) year, or by both such fine and imprisonment."

Plaintiff in error contends that the act in question does not cover labels or trade-marks on bottles, and that as it appears from the indictment that the labels alleged to be counterfeit were upon bottles, the sale charged is not within the statute. This point is not well taken. That language of section 2 which we have above italicized includes goods, wares and merchandise of every description, no matter how packed or prepared and no matter in what contained, to which or upon which any imitation or counterfeit label is in any manner attached, affixed, printed, painted, stamped or impressed.

Section 3 of chapter 140, *supra*, provides for filing the label or other mark or device for record in the office of the Secretary of State "by leaving two (2) copies, counterparts or *fac similes* thereof with said Secretary, and by filing therewith a sworn statement specifying the name or names of the person, association or union on whose behalf such label, trade-mark * * * or form of advertisement shall be filed, the class of merchandise and a particular description of the goods to which it has been or is intended to be appropriated;" and stating that the party in whose behalf the label or other mark or device shall be filed has the right to use the same; that none other has the right to use the same or "any such near resemblance thereto as may be calculated to deceive," and that the copies, counterparts or *fac similes* filed with the affidavit are true and correct. The Secretary of State is then required, upon payment of his fees, to deliver to the person, association or union filing the label, mark or other device, as many certificates, duly attested, of the recording of the same, as such person, association or union may desire, and that certificate shall in all suits and prosecutions be proof sufficient of the adoption of such label, mark or other device.

Counsel for the People contend, erroneously as we think, that this conviction could be sustained without the label having been recorded if the proof showed that the label had been adopted or used by its owner prior to the time of the alleged offense, and that it was therefore unnecessary to show by the indictment a compliance with section 3, *supra*, in regard to recording.

A careful consideration of the various provisions of this act has led us to the conclusion that a prosecution cannot be successfully maintained under its provisions except for acts done after the copies of the label or other mark or device, with the accompanying affidavit, has been filed with the Secretary of State for record. The only method provided for establishing the fact that such label or other mark or device has been adopted or used by any person, association or union is by the certificate of the Secretary of State, and we think, therefore, that the purpose of the legislature was that no conviction should be had unless such proof could be made of the adoption of the label or other mark or device by some person, association or union. Such certificate would not be conclusive evidence that the defendant was without right to use the label, mark or other device in question, but it would be *prima facie* evidence to that effect.

The indictment fails to specifically aver the filing of the affidavit required by section 3, *supra*, and plaintiff in error urges that it is for this reason fatally defective. The allegation in this respect is, "which said labels, so adopted and used and being used as aforesaid by said co-partnership, as aforesaid, before then duly filed for record in the office of the Secretary of State of the said State of Illinois, as by law provided." An examination of the language above quoted from section 3, *supra*, shows that the manner of filing a label for record shall be by leaving two copies, or counterparts or *fac similes* thereof, with the Secretary of State, "and by filing therewith a sworn statement," etc. The averment that the labels were duly filed for record "as by law provided,"

means that the copies, counterparts or *fac similes* were left with the Secretary and that they were accompanied by the necessary sworn statement, and that such copies, counterparts or *fac similes*, and such sworn statement, were by the Secretary of State filed for record.

The indictment is sufficient. The other objections to its validity are wholly without merit.

The proof shows that plaintiff in error, Vincendeau, was a wholesale dealer in wines and liquors in Chicago, and had been in that business for many years. Otto Schmidt, to whom the indictment charges the sale was made, was president of the Otto Schmidt Wine Company, also engaged in business in that city. Vincendeau sold to Schmidt twenty-four bottles of wine in five cases. On each bottle appeared a counterfeit of the label of G. H. Mumm & Co., mentioned in the indictment. This purchase was made by Schmidt for the company of which he was president, and it is said that there is for this reason a variance between the proof and the indictment.

We think there is no variance. The sale was in fact made to Schmidt; that is, he in person negotiated and concluded the purchase, but it does not appear that he disclosed to Vincendeau or Vincendeau's agent, at or before the time of the purchase, the fact that he was purchasing for the company. Whether he was in fact acting for himself or as agent of another is in this case, under these circumstances, wholly immaterial.

Mumm's Extra Dry is a high grade champagne made in France. The wine sold by Vincendeau to Schmidt was an inferior and cheaper kind. The genuine label duly filed for record with the Secretary of State, as mentioned in the indictment, is the label used by G. H. Mumm & Co. in selling Mumm's Extra Dry, and labels which appeared on the bottles of wine so sold by Vincendeau to Schmidt were counterfeits of G. H. Mumm & Co.'s label. Schmidt and another, called for the prosecution, testified that Vincendeau told

Schmidt that he, Vincendeau, made a "bogus champagne" from Alabama and Georgia wines, and had the imitation labels, such as appeared on the bottles sold to Schmidt, printed in Chicago, and that he put them on the bottles of "bogus champagne" which he manufactured, and that the wine which he sold Schmidt was of this manufacture and the labels of those so obtained by him. Vincendeau denied that any such conversation took place; denied that he was engaged in the manufacture of such "bogus champagne" or that he had any such labels printed, and denied any knowledge that the labels on the bottles of wine sold to Schmidt were counterfeit. He admitted selling the bottles of wine bearing the labels in question to Schmidt, but testified that he had theretofore loaned \$100 to one August Schott, and had taken the bottles of wine in question from Schott as security for the loan; that default being made in the payment of the money borrowed, he made sale of the wine through an agent, believing the wine and labels to be genuine. He was corroborated to some extent by Amelie, wife of August Schott, and by one Pierre Bazile.

Under these circumstances, the accused called Peter Schneider, an expressman, and proved by him that he delivered the five cases in question, under Vincendeau's direction, to the Schmidt Company, and offered to prove further by Schneider that at an earlier date he, Schneider, brought the same cases of bottles from Schott's place, on North avenue, in the city of Chicago, to Vincendeau's wholesale establishment. This offer the court refused, saying, "Anything before the sale about these cases is immaterial." In this the court erred. Vincendeau's guilty knowledge is an essential ingredient of the offense. He, by his testimony, denied that at the time of the sale he had any such knowledge, and the evidence which he sought to elicit from Schneider would have corroborated him in this regard. We have carefully considered all the evidence in this case and are of the opinion that the guilt of Vincendeau was not so conclu-

sively proven as to make it clear that the exclusion of this testimony was harmless error.

The indictment set out certain names as those of the persons composing the firm of G. H. Mumm & Co., among which appears the name Matt Von Guaita. On the trial the prosecution sought to prove the names as laid. One witness testifying for the People stated that Von Guaita's first or given name was Max, and not Matt. Other witnesses testified that his first name was Matt; but the proof did not certainly establish Von Guaita's first name to be as stated in the indictment. It is plain that the two names are not *idem sonans*. *Gonzalia v. Bartelsman*, 143 Ill. 634; *Dauids v. People*, 192 id. 176.

The court, however, at the request of defendant in error gave to the jury the following instruction:

"The jury are instructed that it is necessary for the People to prove the names of the partners of the G. H. Mumm & Co. firm, but that in this State the doctrine of *idem sonans* applies,—that is, where the names are so similar in sound when pronounced as to be easily mistaken, one for the other, then the proof of one will sustain the allegation of the other. The law does not favor extreme technicality in regard to proof of name where the sound of the names is very similar."

Waiving other objections, this instruction is erroneous and misleading because the term "extreme technicality" is one which has no fixed and definite meaning, and as used in this instruction it was apt to induce the jury to disregard the difference between the two names Matt and Max in case the jury had, from the evidence, any reasonable doubt as to which of these names was in fact that of the partner in question.

It is unnecessary to consider other errors assigned.

The judgment of the Appellate Court and the judgment of the criminal court will be reversed, and the cause will be remanded to the criminal court for further proceedings consistent with the views herein expressed.

Reversed and remanded.

WILLIAM FITZGERALD

v.

MATHIAS BENNER *et al.**Opinion filed February 21, 1906.*

1. EVIDENCE—*when words used over telephone are part of the res gestæ.* Where a sub-contractor, called as a witness for the plaintiffs in a suit on a building contract for the purpose of showing that the delay was not the fault of the plaintiffs, who were to furnish certain of the iron work, testifies that he was at the building day after day when there was an abundance of iron on the ground but was unable to go ahead with the work, it is not error to permit him to say that he telephoned every day to plaintiffs, "Can't I start?" since those words are part of the *res gestæ*, and are not hearsay, even though the defendant was not present.

2. SAME—*when permitting witness to refresh his recollection by use of memorandum book is not error.* In an action on a building contract it is not error to permit a witness to refresh his recollection as to dates and weather conditions by reference to a memorandum book, in which he made the entries in the usual course of business as the work progressed.

3. SAME—*when refusal to strike out statement of a conclusion is not harmful.* Where a witness in an action on a building contract has detailed all the conversations between him and the defendant and the architect relating to the payment of the amount in controversy, refusal of the court to strike out the expression "he kept putting me off," is not prejudicial error, even though the expression be regarded as a statement of a conclusion of the witness rather than a statement of fact.

4. BUILDING CONTRACTS—*when absence of architect's certificate does not defeat recovery.* Where work has been substantially performed under a building contract, the only thing lacking being the certificate of the architect which has been improperly withheld, an action will lie to recover the amount due, and proof may be made as to the excuse for not procuring the certificate.

5. SAME—*what constitutes bad faith on part of architect.* An architect who inspects the work and accepts it as being in compliance with the contract, but refuses without good reason to deliver his certificate, is guilty of bad faith, and whether delay in payment thus caused is unreasonable and vexatious, so as to warrant allowance of interest, is a question for the jury, where the architect is the owner's agent and acts under his direction.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. JOHN GIBBONS, Judge, presiding.

This is an action of assumpsit, brought on July 10, 1900, in the circuit court of Cook county by the appellees, William D. Kent and Mathias Benner, constituting the firm of M. Benner & Co., against the appellant, William Fitzgerald, to recover a balance of indebtedness, claimed to be due upon a building contract, together with interest thereon. The trial resulted in a verdict and judgment in favor of the appellees for \$6000.00. This judgment has been affirmed by the Appellate Court, and the present appeal is prosecuted from such judgment of affirmance.

The declaration, as first filed, consisted of the common counts for goods sold and delivered, for the reasonable value of said goods, for money loaned and advanced, and upon account stated, the *ad damnum* being laid at the sum of \$15,000.00. Afterwards, on December 24, 1901, certain additional counts were filed, wherein the building contract was set forth *in hæc verba*, and wherein it was alleged that the appellees had fully completed said contract, and there was due to them from the appellant upon the same the sum of \$6408.63. The second additional count, after stating the contract and that it had been completed, and that a certificate of the amount due had been demanded, and that the architect had figured up and agreed as to the amount due, alleged that the architect, acting in bad faith and in collusion with appellant as owner, refused to issue a final certificate to the appellees. Pleas of the general issue, and denying the charges of collusion and bad faith, were filed.

The building contract in question was dated August 22, 1892, and was executed between appellant, as party of the first part, and appellees, under the firm name of M. Benner & Co., as parties of the second part, wherein Benner & Co. agreed to erect and complete the iron work for a six-story

flat-building, belonging to the appellant, at the corner of Twenty-sixth and State streets in Chicago. The price to be paid by appellant to appellees was fixed by the contract at a certain sum for castings per ton, another sum for beams per ton, and other sums per pound for punching, coping, riveting, and for anchors, steel plates, stirrups and straps; and also a certain sum was to be paid as the price per square foot for Hyatt lights. Between August 22, 1892, and some date in the winter of 1892 and 1893, or in the spring of 1893—about which latter date the parties differ—material and labor, amounting to \$22,908.63, are alleged to have been furnished by the appellees. There were paid to them upon the contract the following amounts: November 23, 1892, \$5000.00; December 17, 1892, \$5000.00; February 21, 1893, \$6500.00, making \$16,500.00 as the total amount of payments, which, taken from \$22,908.63, leaves \$6408.63, being the amount due according to the claim of the appellees.

By the terms of the contract the work was to be done under the direction and supervision of Clinton J. Warren, an architect, who was required to certify in writing as to all materials, workmanship, etc. Payment was to be made upon presentation of certificates, signed by the architect. The contract contained the following provision: "And in case the parties shall fail to agree as to the true value of extra or deducted work or the amount of extra time, the decision of the architect shall be final and binding. The same in case of any disagreement between the parties relating to the performance of any covenant or agreement herein contained." The contract also contained the following: "Damages for delay will be \$50.00 per day, for each and every day the work remains unfinished after above date. Damages for delay as mentioned in specifications, will be deducted from the contract price as liquidated, and furthermore fifteen percentum of the value of all work done and materials furnished shall be held back until this contract is declared by Clinton J. Warren completed, or if contract is

completed at specified time or times, said fifteen percentum kept back shall then be paid four days after the work of this contract is declared by the architect finished, provided said work and materials are free and discharged from all claims, liens and charges whatsoever, and so kept during the process of said work. Time,—Basement and first story, September 29; second, October 6; third, October 13; fourth, October 20; fifth, October 27; sixth and roof, November 1. Time contingent on strikes, fires, unavoidable accident, or causes beyond our control." By the terms of the contract Benner & Co. agreed "to furnish at their own expense and under the direction and supervision of Clinton J. Warren, to be approved and certified by a writing or certificate under the hand of the said Clinton J. Warren, all materials, workmanship and labor, required by the said drawings and specifications, and to protect the materials and workmanship from damage by the elements or otherwise until the completion of the work, and to remove all improper materials and work, when directed by architect, and to substitute therefor such materials and work as, in his opinion, are required by the drawings and specification aforesaid, and will deliver said building to the said party of the first part free and discharged of all claims, liens and charges whatsoever, completely finished at such time as set forth in the specification." No time seems to have been stated in the specification, the language therein being as follows: "Time: All work to be finished on or before—"

The following instructions were given by the trial court to the jury, to-wit:

16. "The court instructs the jury that in this case he has not expressed, and does not in any of these instructions express, any opinion on the facts of the case, nor upon the credibility or want of credibility of any witness. The facts must be decided by the jury from the testimony which is received in open court. Offered testimony, to which objection was sustained, or which was stricken out by order

of the court, is not before the jury and should not be considered in arriving at your verdict. Statements of counsel for either side, if any, which are unsupported by the testimony, or which are irrelevant to this case, should not be considered. The instructions given you by the court are to be considered as a series. The court has not expressed an opinion on the facts, and has not expressed an opinion on the credibility or character of any witness, and the court has no right to do so, and if the jury overheard anything said between the court and counsel in discussing questions of law or otherwise, the jury should not consider anything but the evidence introduced before them and the law as laid down in the instructions of this court.

17. "If you believe from the evidence and the instructions of the court that the architect or superintendent named in the contract in this case accepted the work performed by the plaintiffs as the work progressed, as required by the contract, and if you further find from the evidence that such contract was completed in accordance with the terms thereof, and you further believe from the evidence that, after the contract was completed, the architect accepted the work performed by the plaintiffs, and if you further believe from the evidence and instructions of the court that the architect withheld or refused to deliver to the plaintiffs his statement, or certificate in writing, showing the amount due the plaintiffs, if anything, either because the defendant, the owner, directed him, the said architect, to withhold or not to deliver the same, or for any other reason not in accordance with the terms of the contract between said parties, if shown by all the evidence in this case, then you are instructed, if you find such facts proven from the evidence, that the plaintiffs would not be bound to produce such certificates, before they were entitled to recover in this case.

18. "The court instructs the jury that, if you believe from the evidence that the architect, Clinton J. Warren, in this case inspected the work in question and knew its char-

acter and quality, and that said architect accepted the work done and materials furnished by the plaintiffs as being in compliance with and in full performance of the contract on plaintiffs' part, and if you further believe from the evidence, and under the instructions of the court, that said contract was completed in accordance therewith, and you further believe from the evidence that said architect in bad faith and without just cause refused to deliver to the plaintiffs a final certificate, showing such acceptance and completion and the balance due the plaintiffs, if any, then the plaintiffs are entitled to recover whatever, if anything, the jury shall find from the evidence is due upon the contract.

19. "The court instructs you that if you find from the evidence and under the instructions of the court, that the plaintiffs are entitled to recover from the defendant, and if you find from the evidence that such money as you find the plaintiffs are entitled to, if any, was withheld by an unreasonable and vexatious delay of payment, then you may allow the plaintiffs interest at the rate of five per centum per annum on such sum, if any, as you believe from the evidence and under the instructions of the court, the plaintiffs are entitled to recover from the defendant from the date the same became payable, as may be shown by the evidence in the case; what the facts are you must determine from the evidence."

DAVID K. TONE, and WILLIAM H. FITZGERALD, for appellant.

WILLIAM A. DOYLE, for appellees.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

In this case the evidence shows that the labor and material, for the price of which this suit is brought, were furnished by the appellees; and the defense of the appellant

rests upon substantially two grounds. The first ground of defense is, that there can be no recovery, because the certificate of the architect was not produced, as required by the contract, and because the certificate was not shown to have been withheld fraudulently, or by reason of fraud on the part of the architect. The second ground of defense is, that there can be no recovery, because the damages, alleged to have been sustained by the appellant by reason of defective material and delay in completing the work, exceeded the amount claimed by appellees. That is to say, according to the claims of appellant, the appellees were continuously in default from September 29, 1892, until February 15, 1893, a period of 139 days, and the liquidated damages for the delay, at the rate of \$50.00 a day for 139 days, would amount to \$6950.00, which exceeds the sum of \$6408.63, claimed by the appellees to have been due them. The main contention of the appellees in regard to the delay was, that they were delayed in the performance of the contract by the fault of other contractors. The objections made by appellant, which range themselves under, and bear upon, the general defenses above stated, will be considered in their order.

First—Appellant contends that the court below erred in the admission and exclusion of evidence.

It is said that the court erred in permitting appellees to prove, that the interest on the claim against appellant from December 15, 1892, up to the date of the trial amounted to \$3407.00. It is claimed that there is no evidence, showing the completion of the work on December 15, 1892. We have examined the testimony, and find that there was evidence, consisting of the testimony of several witnesses introduced by the appellees, showing that the work was completed about the middle of December, 1892. It is true that testimony, introduced by the appellant, tended to show that the work was not completed until February 15, 1893, but the court, under its instructions, properly submitted the evidence to the jury upon this question, and it was for them to determine

which was the correct date of the completion of the work. It is also insisted that the court erred in allowing this testimony in regard to interest, upon the alleged ground that the appellees did not make out a case of vexatious and unreasonable delay of payment. It is undoubtedly true that, in order to justify a recovery of interest, the claim must be liquidated, and it must be shown that the parties figured upon a definite amount as being due, and that payment has been vexatiously and unreasonably withheld. (*Haight v. McVeagh*, 69 Ill. 624; *Imperial Hotel Co. v. Claflin Co.* 175 id. 119.)

There was evidence, introduced by the appellees, tending to show that appellee, Kent, after January 18, 1893, went to the office of the architect, Warren, and submitted the account, which was checked up, and the sum of \$6000.00 was agreed upon as being due appellees, and that a certificate of that amount was made out under the direction of the architect, Kent consenting to throw off the \$408.63 rather than have any quarrel or dispute. The evidence tends further to show that the architect put off the payment of the amount, thus agreed to be due, at one time by asking that it be allowed to rest for a day or two until the architect could see appellant; at another time, several weeks thereafter, when Kent demanded the certificate, the architect said that he had had a talk with the appellant, and asked that it be allowed to rest a while longer as appellant was pressed for money; again, after the lapse of several weeks, Kent was told by the architect that appellant had instructed him not to give appellees a certificate; and the architect told Kent that he had better see the appellant, and have a talk with him, and fix it up; Kent thereupon went to see Fitzgerald, who told him to go to the architect, saying: "You get a certificate from the architect, and I will pay it;" when Kent went back to the architect, he was informed by him again that Fitzgerald had told him (the architect) not to give the certificate. When Kent returned to the architect after the fourth or fifth

visit, the latter told him that he was entitled to his money, but that he would have to see Fitzgerald, the owner of the building, who had given him an order not to issue the certificate; thereupon, on seeing Fitzgerald, he was again told by the latter, "You get a certificate and I will pay it;" and thereafter, when Kent attempted again to see the architect, he found that the office of the latter was closed, and he had left for Europe. This evidence tended to show a vexatious and unreasonable delay of payment, and therefore justified the introduction of testimony in regard to the amount of interest. Independently, however, of any other consideration, it sufficiently appears that the jury did not allow the appellees any interest, and, therefore, the introduction of the testimony in question could not have done the appellant any harm. If the sum of \$3407.00 had been allowed for interest, the verdict would have been \$9407.00. As, however, the verdict was only for the sum of \$6000.00, being the amount of principal agreed upon by the parties, it is clear that there was no allowance of interest.

The court is said to have erred in permitting a witness for the appellees, named Anderson, to state what he said over the telephone at a certain time. Anderson appears to have been a sub-contractor under appellees, who was to furnish certain of the iron work. He was put upon the stand for the purpose of showing that the delay in the putting up of the iron work was the fault of appellant. Anderson states, that he was at the building from the 5th to the 30th of September almost every day, but was unable to go ahead, stating that the iron was lying all around the street, and they were kicking about it blocking up the street. He then makes the following statement: "I asked every day, telephoned every day, 'Can't I start?' because I had a gang idle." The objection is, that this was a conversation by telephone between Anderson and appellees, at which the appellant was not present, and that, therefore, the evidence was mere hearsay and should have been excluded by the court. The only

language, shown to have been used over the telephone, are the words "Can't I start?" These words were a mere exclamation, which constituted a part of the *res gesta*, as being calculated to illustrate or picture the condition of affairs then existing at the building. It tended to show the reason why appellees could not go ahead with the work. The words were not the narration or history of a past event, but threw light upon the reason why it was impossible to proceed with the work. In *Maher v. City of Chicago*, 38 Ill. 266, where certain city officials made statements during the prosecution of work for a corporation to persons engaged on the work, it was said (p. 273): "Counsel for the city contend that the statements of the city officials were improperly received as evidence. These statements were made at the commencement and during the progress of the work to persons engaged upon it, and are admissible as showing the manner and circumstances, under which it was begun and prosecuted. They are part of the *res gesta*." In *Kyner v. Boll*, 182 Ill. 171, it was said (p. 186): "It is a well settled principle in the law of evidence, that, whenever it becomes important to show, upon the trial of a cause, the occurrence of any fact or event, it is competent and proper to also show any accompanying act, declaration or exclamation, which relates to or is explanatory of such fact or event. Such acts, declarations or exclamations are known to the law as *res gesta*." (*Lander v. People*, 104 Ill. 248).

It is furthermore objected that the court permitted plaintiffs to prove the time when the work was completed by entries, made in a private memorandum book. When the witness, Anderson, was upon the stand, he was questioned as to the time when the work was completed. He stated, independently of any memorandum book, that the work was completed about the middle of December, 1892. He then made use of the memorandum book merely for the purpose of refreshing his recollection; and counsel for appellant drew from the witness upon cross-examination, that the

witness remembered the date, because he had entered it in his book. The attention of the witness was called by counsel for appellant to the book, which the witness had kept as the work progressed. A part of the delay in the progress of the work was not only attributed to the slowness of other contractors, such as the masons and carpenters, but also to the condition of the weather. Anderson had minuted in his book the days upon which, during the progress of the work, it had rained, and, upon cross-examination, counsel for appellant asked him to look over his book, and tell how many days it rained during September and October, 1892. After this cross-examination, the witness was asked by counsel for appellees to give the condition of the weather between certain dates in December, 1892. It was to this question that counsel for appellant objected, which objection was overruled. We concur with the Appellate Court when they say in their opinion: "We do not think that there is any merit under these circumstances in the contention of appellant in regard to this book." The book itself was not introduced in evidence, and it appeared that the entries therein were made by the witness at the time of the events spoken of by him, and in the course of his duty, as an employe of appellees, in and about the particular business in controversy. In *Lawrence v. Stiles*, 16 Ill. App. 489, it was said: "It is well known that memoranda and entries made at or about the time of the transactions to which they relate, in the regular and usual course of business and of the employment and duty of the person who made them, have long been admitted as part of the *res gesta*."

It is furthermore objected that the appellee, Kent, when a witness upon the stand, was permitted to use the expression, "he kept putting me off." A motion was made to strike out this expression, and was refused by the court, to which exception was taken. Counsel for appellant say that, in the use of these words, the witness was stating a conclusion only, and not a fact. We think that, under the circum-

stances above detailed, it was a statement by the witness of a fact; but whether this be so or not, the expression was harmless, for all the conversations between appellees and the appellant and the architect, relating to the payment of the amount in controversy, were fully and particularly given in the testimony. Where the actual and specific language of all parties is fully given, there can be no prejudice or harmful effect if the witness does state a conclusion. (*Sokel v. People*, 212 Ill. 238.) It is insisted that the court erred in refusing to permit Kearns, the assistant of the architect and superintendent of the work under the architect, to state what he said to Warren at the time certain letters were written to appellees, calling attention to the defects in certain columns put up by appellees. After an examination of the record, we are satisfied that the witness, Kearns, did state all that was said in reference to the columns. He says he told the architect the columns were imperfectly cast, etc. It is also said that, when the witness, Kent, stated that he had been informed that the architect had gone to Europe, appellant's counsel was not permitted to cross-examine him as to the persons, from whom he had obtained such information. The record shows that he was allowed to give at least the names of three persons, who had so informed him, and, when he had given such names, it was not error on the part of the court to refuse to permit counsel to proceed further upon that subject.

Second—Instruction, numbered 17, given for the appellees, set forth in the statement preceding this opinion, is objected to upon the alleged ground that it assumes, as a fact, that appellant directed the architect to withhold and not deliver the final certificate to the appellees. The instruction is not justly subject to the criticism made upon it. The part of the instruction, which is said to contain the assumption complained of, is preceded by the words: "If you further believe from the evidence," etc., and is followed by the words, "if shown by all the evidence in this case." The jury

were thus told to find from the evidence whether or not the architect refused to deliver the certificate, and were not directed to assume the non-delivery of such certificate as a fact. (*Shannon v. Swanson*, 208 Ill. 52; *Chicago City Railway Co. v. O'Donnell*, 208 id. 267; *Smith v. Henline*, 174 id. 184; *Illinois Terminal Railroad Co. v. Thompson*, 210 id. 226; *Gerke v. Fancher*, 158 id. 375). In addition to this, in instruction, numbered 12 and other instructions given for appellant, the jury were told that the burden of proving the refusal to issue a final certificate was upon the appellees, and that appellees must prove such refusal by a preponderance of the evidence. In one instruction they were told: "If you believe from the evidence in this case that the plaintiffs have failed to prove by the preponderance or greater weight of the evidence that the architect, Clinton J. Warren, fraudulently and in collusion with the defendant Fitzgerald, refused to issue a final certificate to the plaintiffs, then your verdict should be for the defendant." Instruction, numbered 17, is also objected to upon the ground that it told the jury that, if the plaintiffs completed the work in accordance with the terms of the contract, then they could recover without any reference to the fraud of the architect, it being the contention of the appellant that the contract makes the architect the final arbiter of all disputes between the parties, so that his decision is conclusive, and no recovery could be had without showing fraud on his part. Whether or not the contract between the parties made Warren, the architect, arbitrator of all disputes and questions of payment of money due under the contract, is a question which we do not deem it necessary to decide, because, even if appellant's contention upon this subject is correct, at least four instructions, given for the appellant, announced the construction of the contract contended for. For instance, instruction numbered 10, given for the appellant—after presenting to the jury the questions whether or not appellees completed the work in accordance with their contract, and

whether or not a dispute arose as to such completion, and whether or not the architect in good faith decided that appellees had failed to complete the contract within the time specified, so that there was no money due from appellant to appellees for the work—told the jury “that it makes no difference whether said Clinton J. Warren decided said disputes correctly or not; because, under the contract offered in evidence in this case, both parties herein agreed that the decision of said architect, when honestly made, should be final and binding upon the parties hereto. What the facts are you must determine from the evidence.”

Instruction, numbered 17, is further criticised upon the alleged ground that it ignores the defense of the appellant, which defense is that the liquidated damages for the appellant amounted to more than the entire claim of the appellees, computed at the rate of \$50.00 a day for the total period of delay. On this point counsel for the appellant say: “The appellees were in default from September 29, 1892, until February 15, 1893, being a delay in all of one hundred and thirty-nine days, and the liquidated damages for the delays under the terms of the contract amounted to \$6950.00. Now, the total amount of the appellees’ claim was only \$6408.63, so if the testimony of the defendants’ witnesses was true, even if the contract was completed in accordance with the terms thereof, there was nothing due to the appellees.” The instruction was not erroneous in omitting the question of damages by way of set-off, as it is not always necessary to negative mere matter of defense. The instruction does not assume to enumerate all, or any of, the elements, essential to a recovery by the appellees. It simply relates to the question of excuse for the non-production of the architect’s certificate. (*Illinois Central Railroad Co. v. Smith*, 208 Ill. 608). An instruction, containing all the elements necessary to a recovery upon the plaintiffs’ theory, is sufficient without negating defensive matter or theories. (*Chicago Union Traction Co. v. Leach*, 215 Ill. 184; *Mt. Olive Coal Co. v.*

Rademacher, 190 id. 538.) The plaintiff is only obliged to present the law correctly in his instructions applicable to his theory of the case, and is not bound in every instruction to anticipate and exclude every possible defense. It is not necessary in an instruction to negative matter of mere defense. (*City of Chicago v. Lonergan*, 196 Ill. 518). Moreover, instruction, numbered 15 given for the appellant, informed the jury that a certain time was fixed in the contract for the completion of the iron work by the appellees, and it was stated therein that, if the appellees failed to complete the iron work within the time specified, the appellees would be liable for the sum of \$50.00 per day liquidated damages for each and every day the iron work remained unfinished after the time therein specified. Instruction, numbered 14 given for the appellant, told the jury that, if they found the amount of damages, so sustained by the appellant by reason of the failure of plaintiffs to perform the work within the contract time exceeded the amount claimed by appellees, they were to find the issues for the defendant.

Objection is also made to instruction numbered 18, as set forth in the statement preceding this opinion. This instruction is said to be erroneous upon the alleged ground that it told the jury that, if the architect refused to deliver to the appellees a final certificate "in bad faith and without just cause," appellees were entitled to recover. The instruction is charged with being defective, as not stating to the jury what facts constituted "bad faith and without just cause." We think the instruction, taken as a whole, clearly informed the jury what facts, under the circumstances of this case, would amount to bad faith and the absence of just cause. If the architect inspected the work and accepted it as being in compliance with the contract, and then refused to deliver the certificate, he was guilty of bad faith. Objection is also made to instruction 19, given for the appellees and set forth in the statement preceding this opinion. What has already been said in regard to the subject of interest answers

the objection, made to this instruction. The evidence tended to show an unreasonable and vexatious delay of payment, and it was for the jury to say whether that delay was occasioned by the fault of the appellant. The delay of the architect was the delay of the appellant, as the architect was to a certain extent the agent of the appellant, and, according to the testimony of the appellees, acted under the instructions of the appellant in refusing to deliver the certificate. The instruction is not justly subject to the criticism, that it leaves the jury to estimate the amount of damages according to their own individual notions of right and wrong, because it specifically refers them to the evidence under the instructions of the court. (*Springfield Consolidated Railway Co. v. Puntenney*, 200 Ill. 9).

It is also said that instruction No. 16, given for the appellees, as set forth in the statement preceding this opinion, is erroneous, because it told the jury "that the facts must be decided by the jury from the testimony, which is received in open court." The word, "testimony," is said to signify oral evidence only, and therefore excluded from the consideration of the jury the documentary evidence. Even if such be the correct meaning of the word "testimony," it could not have misled the jury in the present case, for the reason that the concluding sentence of the instruction directs the jury to "not consider anything but the evidence introduced before them, and the law as laid down in the instructions of this court." It is admitted that the word, "evidence," is broad enough to include the documentary, as well as the oral evidence.

Third—It is next urged by counsel for appellant, that improper remarks were made by the court, and by counsel for appellees, in the presence of the jury to the prejudice of the appellant.

Certain letters were introduced in evidence by the appellant, purporting to have been written by the architect to appellees, complaining of the delay in the progress of the

work. The letters thus introduced were stated by the architect, when he was upon the stand as a witness, to be the only letters or documents in his possession. Subsequently, a letter was produced, written by the appellees to the architect, and it was stated, on the part of the appellant, that such letter was in the possession of the architect when he had previously testified. It appears that the architect was not within reach after he had given his testimony, and after the omitted letter had thus been introduced. It is said by counsel for appellant that the court intimated to the jury that the architect, Warren, had willfully suppressed a letter that was in his possession while on the stand. In reference to this letter the court asked: "Was this in his possession when he was on the stand?" to which counsel for appellant answered, "Yes;" the court then said, "I would like to have him here." The remark of the court can only be construed to have meant that he would like to have the architect, Warren, present in court to explain his previous statement, that he had produced all the letters in his possession, when subsequently one was introduced, which was admitted to have been in his possession when he testified, but not then referred to. The remark of the court cannot be construed as a charge that the architect had willfully suppressed a letter in his possession, but merely expressed a desire to have him make an explanation in regard to the matter. We are not satisfied that any harm was done to appellant by this remark of the court, although such remark might well have been omitted.

The witness, Anderson, had testified, contradicting the appellant's witness that the work in question was completed in December, 1892, and also telling of the many days of bad weather, which he claimed to have made a minute of in a private memorandum book. Upon the cross-examination of the witness in regard to this matter by counsel for appellant, the following occurred:

"Q. Did you vote at the election in the year 1892? In the fall of 1892, in November? (Objection by plaintiff).

The court: "We will rule out politics in this case.

Mr. Tone: "It has something to do with the memory.

The court: "If he isn't right you can bring in the weather bureau man. (To which statement of the court the defendant by his counsel then and there duly excepted).

A. "I haven't got marked down whether I voted at the election in 1892 or not."

The remark of the court, which is objected to, is the following: "If he isn't right, you can bring in the weather bureau man." Counsel on cross-examination had asked witness numerous questions in regard to the condition of the weather during the progress of the work, and had been allowed wide latitude in such cross-examination as to the weather. The question, whether or not the witness voted at the election in 1892 was improper and immaterial, and the remark of the court merely prevented further examination in this improper and immaterial vein. We cannot see that any harm could have been done to the appellant by the remark of the court, inasmuch as a further continuation of the cross-examination in regard to the weather was wholly unnecessary, enough already having been drawn out upon that subject.

Some other objections are made to the action of the court and to the remarks of counsel, but after a careful examination of them, we are of the opinion that they are not of sufficient importance to justify us in reversing the present judgment. The trial as a whole seems to have been conducted fairly, so far as the court was concerned.

The judgment of the Appellate Court, affirming the judgment of the circuit court, is affirmed.

Judgment affirmed.

THE CHRISTIAN CHURCH OF SAND CREEK *et al.*

v.

THE CHURCH OF CHRIST OF SAND CREEK *et al.*

Opinion filed February 21, 1906.

1. CHURCHES—*courts cannot pass upon church differences except in so far as property rights are involved.* Secular courts are powerless to pass upon questions of difference between contending factions of a church congregation except in so far as property rights are involved.

2. SAME—*on division of congregation the property belongs to that portion observing original doctrines.* Where members of a religious congregation divide and a new organization is formed by the withdrawing faction, the title to property of the congregation remains in that part of the congregation which adheres to the tenets and doctrines originally taught by the congregation to whose use the property was originally dedicated.

3. SAME—*when name in which deed was taken has little weight.* In determining to which faction of a congregation incorporated, respectively, after division as the "Christian Church" and the "Church of Christ" the property of the congregation belongs, the fact that the deed was to the trustees of the "Christian Church" has but little weight, where the congregation was not at that time incorporated, and was known then and afterwards, until the time the congregation divided, by both names, the name "Christian Church" being over the door and the business being conducted in the name "Church of Christ."

4. SAME—*deed to trustees of congregation not void because congregation was not incorporated.* A deed to the trustees of a named church is in the nature of a charitable trust, and is not void for want of a grantee because the congregation was not incorporated, but in such case all members of the congregation become beneficiaries in the property conveyed.

5. SAME—*seceding faction which teaches innovations abandons interest in property of original congregation.* Members of a seceding faction of a congregation, who form a new organization and teach and practice innovations not recognized or taught by the original congregation, abandon their interest in the property belonging to the original congregation at the time of the division.

6. SAME—*effect where majority of other congregations have adopted innovations taught by seceding members.* Where all con-

gregations of a particular denomination are self-governing and independent of the others, the fact that most congregations have adopted the innovations practiced and taught by the seceding faction of a particular congregation has no effect to strengthen the rights of the seceding members, where the particular congregation has not adopted such innovations but adheres to its original tenets and doctrines.

7. *SAME—when title to property vests in non-seceding faction.* Where, after division of a congregation, the members remaining loyal to the original tenets and doctrines of the congregation incorporate as the "Church of Christ," the title to property previously conveyed for the benefit of the congregation to the trustees of the "Christian Church," which had not then been incorporated, vests immediately in the corporation so organized, and is not divested by the subsequent incorporation of the seceding faction under the name "Christian Church."

WRIT OF ERROR to the Circuit Court of Shelby county;
the Hon. SAMUEL L. DWIGHT, Judge, presiding.

CHAFEE & CHEW, for plaintiffs in error:

The members of a faction of a church do not withdraw from the church by keeping up a separate organization, holding separate service at separate times under another pastor, or by discharging the original pastor. 24 Am. & Eng. Ency. of Law, (2d ed.) 354; *West Koshkonong Congregation v. Ottsen*, 80 Wis. 62; *Holm v. Holm*, 81 id. 374.

The majority of a church which has abandoned a religious faith on which the church was founded cannot hold the church property against a minority which adheres to the original doctrine. *Smith v. Pedigo*, 32 L. R. A. 838; *Schnorr's Appeal*, 5 Am. Rep. 415.

The minority of a church acting in harmony with its laws and adhering to the faith constitute the church, as against a majority which has departed from the faith. *Smith v. Pedigo*, 32 L. R. A. 838.

The majority of the members of a church independent in government has no power to divert church property to the

propagation of doctrines contrary to those held by their denomination. *Mt. Zion Church v. Whitmore*, 83 Iowa, 138.

In case of a division in the congregation, the title to the property is in that portion of the congregation which adheres to the denomination of which the congregation was a part and conforms to its rules, doctrines and beliefs. *Roshi's Appeal*, 69 Pa. 466.

It is the well settled law of the civil courts that title to church property, in case of schism in a congregation, is in that part of the congregation which is acting in harmony with its own law and the ecclesiastical laws, usages, customs and principles which were accepted among them before the dispute began. In such cases it is the duty of the court to decide in favor of that faction, whether a majority or minority, which adheres to the doctrine maintained by the religious sect of which that congregation was a part. 24 Am. & Eng. Ency. of Law, (2d ed.) 354; *Ferraria v. Vasconcelles*, 23 Ill. 456; *Smith v. Pedigo*, 145 Ind. 361.

The excommunication by a majority faction of a church of the minority members who still adhere to the original faith and claim to be the church cannot affect the rights of the minority to the church property. *Smith v. Pedigo*, 32 L. R. A. 838.

WILLIAM C. KELLEY, WALTER C. HEADEN, and E. A. RICHARDSON, for defendants in error:

All questions of doctrine, practice and jurisdiction within a church must be determined by the church judicatures. The secular courts of this State have no authority to adjudicate upon them. *Kuns v. Robertson*, 154 Ill. 394; *Chase v. Cheney*, 58 id. 509.

Matters of discipline, only, are not regarded as affecting church trusts; matters of doctrine are. This distinction is recognized in all cases. *Trustees v. Trustees*, 3 Green's Ch. 79; *Fell v. Read*, 3 Ves. 69; *Beatty v. Kurtz*, 2 Pet. 579; *McGinnis v. Watson*, 41 Pa. St. 9.

Where there is a general law authorizing the formation of a corporation and an attempt in good faith to comply with the law, and also a user of the franchise, it has been universally held that there is a corporation *de facto*. *Bushnell v. Ice Machine Co.* 138 Ill. 67; *Hudson v. Green Hill Seminary*, 113 id. 618.

The only effect of the deed executed by Turrentine and wife to the trustees of the Christian Church at Sand Creek, which had no corporate existence, would be that all the members of the body or congregation would become beneficiaries of the property in equal degrees. *Ferraria v. Vasconcellos*, 31 Ill. 25; *Alden v. St. Peter's Parish*, 158 id. 631.

Where a majority of an unincorporated religious society are organized as a corporation under the general law of the State, the rights and interests of the individual members in the property held by the original society are thereby transferred to the corporation. The minority, by incorporating, lose their individual rights and interest in the property which does not pass to any corporation organized by them. *Dubs v. Egli*, 167 Ill. 520; *Happy v. Morton*, 33 id. 398.

A court of equity will not interfere with property held by a religious association, at the instance of a minority of the members, on the ground that the majority has seceded from the regular church organization and such secession amounts to a perversion of the trust, unless there is a real, substantial departure from the purposes of the trust. *Kuns v. Robertson*, 154 Ill. 394; *Happy v. Morton*, 33 id. 398; *Lawson v. Kolbenson*, 61 id. 405.

To justify interference by a court of equity with the action of the church authorities because of deviations from the standards of faith, such deviations should be so palpable and unequivocal as to enable the court, from an examination of the historical and doctrinal practices of the church, to say that there has been an essential change in the fundamental doctrines. *Happy v. Morton*, 33 Ill. 398; *Kuns v. Robertson*, 154 id. 394.

Mr. JUSTICE HAND delivered the opinion of the court:

This was a bill in chancery filed by plaintiffs in error in the circuit court of Shelby county, against the defendants in error, to obtain a construction of a certain deed bearing date July 18, 1874, from James A. Turrentine and wife to the trustees of the Christian Church of Sand Creek, Shelby county, Illinois, and for a decree adjudging the premises described in said deed, and the brick church located thereon, to be the property of the plaintiffs in error. An answer and replication were filed, the cause was tried in open court and a decree was entered dismissing the bill for want of equity, and a writ of error has been sued out from this court to reverse said decree.

It appears from the pleadings and proofs that in the year 1834 a church was organized at Sand Creek, Shelby county, Illinois, by followers of the Rev. Alexander Campbell; that the congregation first erected a log church, in 1851 a frame church and in 1874 a brick church, in which the congregation worshiped until in the year 1904, when the Sand Creek congregation divided, about thirty members thereof designating their organization as the "Christian Church of Sand Creek," and the remainder of the congregation, about one hundred in number, designating their church organization as the "Church of Christ of Sand Creek," and that since the division of the congregation the defendants in error have worshiped in said brick church and the plaintiffs in error have worshiped in a school house near by. From the time of the organization of said congregation, in 1834, up to its division, in 1904, it was called the "Christian Church of Sand Creek" or the "Church of Christ of Sand Creek," the names "Christian Church" or "Church of Christ" being used by the members of the Sand Creek congregation to designate the congregation that worshiped in said log, frame or brick church from 1834 to 1904. The members of said congregation were also at times designated as the "Disciples of Christ." The names "Christian Church" and "Church of Christ" seem

to have been used synonymously by the members of the Sand Creek congregation, some preferring one name and some the other. After the brick church was erected, in 1874, for a time the words "Christian Church, Erected in 1874," were conspicuously placed above the front door of the church. Those words were removed from above the door, however, several years prior to 1904 and at a time when the church building was undergoing repairs.

The several church organizations formed by the followers of Alexander Campbell,—and they are numerous,—at the time of their organization were, and now are, purely congregational in their government; that is, there is no general conference, synod, presbytery or other similar body which exercises supervision over said church congregations, but each organization, in matters of practice, in church government and otherwise, is sovereign, and the congregations so organized have no creed except the Bible, the view of the followers of said Alexander Campbell being, that where the Bible speaks the congregation and its several members are authorized to speak, but where it is silent the congregation and the members thereof should also remain silent. In 1849 there sprang up among the members of said religious sect different views upon subjects of practice to be adopted by the congregations with reference to matters upon which the Bible is silent, one view being, that in the matters upon which the Bible is silent such silence should be construed as a positive prohibition; the other view being, that if the Bible is silent upon a given subject pertaining to church government then the congregation may formulate a rule in that particular for the government of the congregation. The division along the lines above suggested seems to have grown as the church membership increased, and in 1889 there was a wide difference of view between the several congregations, and between the members of the same congregation, relative to many practices in the church, such as to the propriety of having instrumental music in the church during church services; the

employment by the congregation of ministers of the gospel for a fixed time and for a fixed salary; the organization of missionary societies and Sunday schools as separate organizations outside the regular church congregations; the raising of funds for the support of the gospel by holding church fairs and festivals, and perhaps in other matters of a similar character; and in that year, at the annual August meeting held at the Sand Creek church, and where there was present a large concourse of people drawn together from different congregations, Rev. Daniel Sommers, a follower of Alexander Campbell, preached a sermon upon what was characterized as innovations upon the practices of the church, and afterwards a declaration, known as the "Sand Creek Declaration," was presented to the brethren present for their endorsement. That declaration condemned many, if not all, of the practices above referred to. It was signed by a few, only, of those who were present, and it was not considered binding upon any member of the church or upon any congregation unless signed by the member or adopted by the church congregation, but was considered merely advisory to the members of the church. The division heretofore referred to, from that time forward seems to have spread, and at the time this suit was commenced the evidence shows the followers of Alexander Campbell had divided upon those lines to such an extent that one faction in the church was characterized as progressives and the other conservatives, the members favoring the more liberal view being called "Progressives," while those entertaining the more conservative view were called "Antis." The persons entertaining the progressive view appear latterly to have usually favored and taken in their church organizations the name "Christian Church," while those favoring the conservative view have taken the name "Church of Christ" as the name of their church organizations.

While there was some discussion between the members of the Sand Creek congregation prior to the year 1904 in regard

✓ to the "Sand Creek Declaration," and as to the propriety of
✓ having instrumental music in church during church services,
✓ the employment of a minister of the gospel for a fixed time
✓ for a fixed salary, the organization of missionary societies
✓ and Sunday schools outside the church congregation, and
✓ the holding of church fairs and festivals for the purpose of
raising money for the support of the church congregation,
none of those matters were ever brought before the Sand
Creek congregation for discussion and determination, and
that congregation, as such, never took action with reference
thereto, and none of the matters in church practice which are
characterized as innovations were ever endorsed or practiced
by the Sand Creek congregation, but that congregation, as
a congregation, up to the time of its division, in 1904, re-
mained conservative. Prior to 1904 the plaintiffs in error
and the defendants in error met as one congregation in the
Sand Creek brick church and communed together as one
congregation in apparent harmony. There was, however,
shortly prior to that time, some friction between the members
of the Sand Creek congregation with reference to the powers
exercised by the trustees, elders and deacons of that congre-
gation, in their official capacity, in the conduct of the busi-
ness of the congregation, but no complaints were brought
before the congregation, and upon those matters there was
at least apparent harmony until in the year 1904. In the fall
of 1903 a question arose in the congregation as to the pro-
priety of using the brick church as a place in which to hold
a singing school. The officers of the church,—that is, the
trustees, elders and deacons, who had acted as such and had
controlled the affairs of the church organization for many
years,—opposed the holding of the singing school in the
church building at that time and refused to permit its use
for that purpose. After some considerable discussion upon
that question, in the spring of 1904 the dissensions which it
appears had existed in the congregation broke out and the
congregation divided. It was then discovered that the or-

ganization, under the statute, which had been attempted by the Sand Creek congregation in 1897 as the "Church of Christ of Sand Creek" was invalid by reason of the fact that the formalities required by the statute to effect a legal incorporation had not been observed, and there were then made hurried attempts by each faction to effect an incorporation under the statute, the minority as the "Christian Church of Sand Creek" and the majority as the "Church of Christ of Sand Creek," and separate meetings were held by these factions, and the papers required by the statute to be executed and filed to effect an incorporation of a religious body were executed by each faction and were filed in the office of the recorder of deeds of Shelby county and recorded. The majority, who were incorporated as the "Church of Christ of Sand Creek," were in possession of the church property, and the minority, who were incorporated as the "Christian Church," were refused the use of said church building by the majority and thereafter held their meetings in a school house near by. This litigation resulted, and the sole question here to be decided is, does the brick church erected by the Sand Creek congregation in 1874, and the land upon which it stands and which is appurtenant thereto, belong to the plaintiff in error the "Christian Church of Sand Creek" or to the defendant in error the "Church of Christ of Sand Creek?"

The courts of this State are powerless to pass upon the questions of difference between the contending factions of the Sand Creek congregation except in so far as property rights are involved, (*Ferraria v. Vasconcelles*, 23 Ill. 403; *Ferraria v. Vasconcellos*, 31 id. 25; *Kuns v. Robertson*, 154 id. 394,) as it will readily be conceded by all that every person in this country has the full and free right to entertain any religious belief, to practice any religious principle and to teach any religious doctrine which he may desire, so long as it does not violate the laws of morality and property and does not infringe upon personal rights. (*Watson v. Jones*, 13

Wall. 679.) It is not, therefore, within the province of this court to pronounce judgment upon the doctrines taught by Alexander Campbell and believed and practiced by his followers, or to determine which faction of the Sand Creek congregation, in their practices in their church congregation, from an ecclesiastical standpoint, is correct, as the courts have no concern with the questions whether a religious congregation is progressive or conservative; whether a musical instrument shall be present or absent during church services; whether the preacher shall be selected from the congregation or shall be a person employed by the congregation for a stated time at a stated salary; whether missionary societies and Sunday schools shall have separate organizations from the church congregations or not, or whether the funds necessary for the support of the church shall be contributed wholly by its members or raised in part by fairs and festivals. All those questions, and kindred questions, must be left to the determination of the church congregation. Incidentally, however, those questions in this case bear upon the ownership of the church property here involved, and for the purpose of determining to which faction of the Sand Creek congregation the property here in question belongs, the practices of the Sand Creek congregation in the past have a bearing.

When the members of a religious congregation divide and one faction breaks away from the congregation and forms a new organization, the title to the property of the congregation will remain in that part of the congregation which adheres to the tenets and doctrines originally taught by the congregation to whose use the property was originally dedicated. (*Ferraria v. Vasconcelles*, *supra*; *Ferraria v. Vasconcellos*, *supra*; *Church of Christ v. Christian Church of Hammond*, 193 Ill. 144.) Here the property was originally donated to the Sand Creek congregation and has been in use by that congregation from 1834 to 1904, a period of seventy years. When the church site was slightly changed, in 1874, and the brick church erected, the deed to the new

site, which was made in exchange for a deed to the old site, was made to the trustees of the Christian Church of Sand Creek. We think that fact, however, entitled to but little weight in determining the question to which faction of the congregation the church property should now be held to belong. At the time the deed was made the Sand Creek congregation had not been incorporated, and the congregation which worshiped at that place at that time was called at times the "Christian Church" or the "Church of Christ," and no question seems to have been raised as to the legal name of the congregation worshiping at that place until about the time this suit was commenced. While the deed was made to the trustees of the "Christian Church," and the words "Christian Church" were placed for a time above the church door, the business of the Sand Creek congregation, such as issuing of church letters to departing members, appears to have been carried on in the name of the "Church of Christ." At the time of the execution of the deed the Sand Creek congregation had trustees, elders and deacons of the church, and the title to the property conveyed by James A. Turrentine and wife to the trustees of the Christian Church clearly was intended by the grantors to be vested by said deed in said trustees for the benefit of the members who formed the church congregation known as the "Sand Creek congregation," and although said Sand Creek congregation was not incorporated, the deed was not void for the want of a grantee, the conveyance being in the nature of a charitable trust, and all the members of the Sand Creek congregation became, by virtue of the execution of said conveyance, beneficiaries in the property then conveyed. *Ferraria v. Vasconcellos*, 31 Ill. 25; *Alden v. St. Peter's Parish in the City of Sycamore*, 158 id. 631.

It is also clear from the evidence that the Sand Creek congregation, from the inception of its organization to the time of the division, in 1904, as a congregation, was opposed to any innovations in the practices of the church,—that is,

the church is the only source of spiritual life. The church is the only source of spiritual life. The church is the only source of spiritual life.

It is, however, urged that the great majority of the church congregations which are professed followers of Alexander Campbell have adopted, in practice, the innovations from the practice of which defendants in error hold aloof, and that the plaintiffs in error are in accord with the spirit of a more enlightened age than the defendants in error, and that their practices are in harmony with the later teachings of Alexander Campbell himself upon the subjects upon which they differ in their practices and belief from the defendants in error. It appears from the undisputed testimony that the churches organized in accordance with the teachings of Alexander Campbell were all congregational, and that these

congregations, including the Sand Creek congregation, were, and always have been, sovereign in all matters pertaining to church government,—that is, each congregation has the right to determine for itself what its practices in the manner of conducting the worship of God in the congregation and its church business shall be, so long as such practices are not in conflict with the positive commands of the Bible. Such being the fact, although it might appear that every congregation bearing the name “Christian Church” or “Church of Christ” organized throughout the land, other than the Sand Creek congregation, had adopted the practices heretofore referred to, the action of those congregations would not be binding upon the Sand Creek congregation unless that congregation had endorsed and adopted them for the government of the Sand Creek congregation. In July, 1904, after the plaintiffs in error had broken away from the Sand Creek congregation, the members of the Sand Creek congregation who had not seceded met and pursuant to the statute incorporated as the “Church of Christ of Sand Creek.” By that act of incorporation all the property of the Sand Creek congregation became immediately vested in that corporation, (*Dubs v. Egli*, 167 Ill. 514,) and its title thereto was not divested by the act of the plaintiffs in error in subsequently incorporating as the “Christian Church of Sand Creek.” *Happy v. Morton*, 33 Ill. 398.

In the determination of the question here involved it must be borne in mind that this is a contest between two incorporated church organizations, and that the only question that this court can deal with is, in which corporation is the title to the church property which formerly belonged to the Sand Creek congregation now vested? From a careful examination of the record in this case, which contains over sixteen hundred pages, we have reached the conclusion that the learned chancellor who heard the case below rightfully reached the conclusion that the title to that property, at the time of the commencement of this suit, was in the defendant

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in error the "Church of Christ of Sand Creek," and not in the plaintiff in error the "Christian Church of Sand Creek," and rightfully so decreed.

The decree of the circuit court will therefore be affirmed.

Decree affirmed.

THOMAS CRATTY

v.

THE PEORIA LAW LIBRARY ASSOCIATION *et al.*

Opinion filed February 21, 1906.

1. APPEALS AND ERRORS—*when questions relating to forfeiture of franchise are waived.* All questions arising under the allegations of a bill for accounting and dissolution which relate to the forfeiture of the defendant's franchise as a corporation are waived where the complainant appeals to the Appellate Court, where the question of forfeiture could not be reviewed; and such questions, although argued on both sides, will not be considered by the Supreme Court on further appeal.

2. CORPORATIONS—*equity may entertain bill to compel directors of corporation to declare dividend.* A court of equity has jurisdiction of a bill by a stockholder to compel the directors of a corporation to declare a dividend on preferred stock, although as to the common stock the discretion of the directors in that respect will not be interfered with, in the absence of bad faith or arbitrary or unjustifiable conduct.

3. SAME—*stockholder may maintain bill to prevent discrimination in dividends.* A stockholder may maintain a bill in equity to prevent discrimination or unfair distribution of dividends among stockholders of the same class, since such dividends must always be equal and the directors have no discretion to discriminate.

4. SAME—*an agreement for preferred stock is not unlawful.* A provision for preferred stock in the original by-laws of a corporation, whether it be called interest-bearing stock, preferred stock or guaranteed stock, is not unlawful, where all shareholders have agreed thereto; and the contract evidenced by such by-laws, where the rights of third parties do not intervene, will be enforced by the courts as the parties have made it.

5. SAME—*agreement to pay dividends before paying expenses is unlawful.* An agreement by a law library association to pay divi-

dends on the capital stock before paying the necessary expenses is unlawful; but that fact furnishes no excuse for failure to pay such dividends out of the net income after deducting the legitimate expenses of conducting the library, including those incurred for re-binding and for keeping the capital unimpaired.

6. *SAME*—*capital cannot be increased in violation of shareholder's contract for dividend.* Where a shareholder in a library association has a right, under his contract, to an annual dividend on his stock at a fixed rate of interest after the payment of necessary expenses, the directors have no power to use any portion of such dividend to purchase new books, or to otherwise increase the capital by making the library more valuable and useful.

7. *LACHES*—*when doctrine of laches does not apply.* The doctrine of *laches* will not be applied to violations of duty on the part of the officers of a corporation within a few years prior to the filing of a bill by a stockholder for relief.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Peoria county; the Hon. N. E. WORTHINGTON, Judge, presiding.

DAVID McCULLOCH, and JUDSON STARR, for appellant:

The by-laws constitute a contract between the stockholders themselves, and between each of them, and the association. The contract is that the association must pay interest, or so-called dividends, to the stockholders at all events, and such liability is cumulative. *Davis v. Proprietors*, 8 Metc. 321; *Insurance Co. v. Frear Stone Co.* 97 Ill. 537; 1 Cook on Corp. (4th ed.) 3, 263, 269, 271, 273, 277.

Stockholders, as between themselves, may make any deal respecting the stock and the liability of the corporation as they may see fit, provided they all agree and the deal is not in violation of some law of the land. *Alling v. Wenzell*, 35 Ill. App. 246; *Vance & Jones Co. v. Bentley*, 92 id. 287; *Clapp v. Peterson*, 104 Ill. 26; *Coal Co. v. Richardson*, 33 Ill. App. 277; *Scovill v. Thayer*, 105 U. S. 143; *Groh's Sons v. Groh*, 80 N. Y. Supp. 438.

A corporation and its managers are trustees for its stockholders, and if trust funds have been improperly used in purchasing property such property may be followed in equity. No lapse of time is a bar between the trustee and the *cestui que trust*. *Sanger v. Upton*, 91 U. S. 60; *Clapp v. Peterson*, 104 Ill. 26; *White v. Sherman*, 168 id. 589; 25 Am. & Eng. Ency. of Law, 1133; *Abels v. McKeen*, 18 N. J. Eq. 462; 2 Jones on Liens, sec. 1180; *Life Ass. v. Fassett*, 102 Ill. 315; *Chetlain v. Insurance Co.* 86 id. 220; *Mining Co. v. Mining Co.* 116 id. 170; *Rice v. Rice*, 108 id. 199.

Dividends of the character here involved are cumulative, and the stockholder entitled thereto, not being paid in any given year, is nevertheless entitled to payment for that year, and with interest. *Elkins v. Railroad Co.* 36 N. J. Eq. 233; *Boardman v. Railroad Co.* 84 N. Y. 157; 1 Cook on Corp. (4th ed.) 269; *Lockhart v. VanAlstyne*, 31 Mich. 76.

J. H. SEDGWICK, F. H. TICHENOR, and GEORGE T. PAGE,
for appellees:

Pleadings are taken most strongly against the pleader. No cause is stated showing that appellant is entitled to any relief. *Lawrence v. Traner*, 136 Ill. 484.

The action should have been for appellant's use and the use of all others similarly situated, or else all stockholders should have been made defendants. The relief prayed is inequitable. *Dorman v. Brereton*, 140 Ill. 153.

Appellant has no standing in equity because he has a complete remedy in law. *Tailoring Co. v. Belding Bros. & Co.* 40 Ill. App. 330; 2 Thompson on Corp. sec. 2290; *Davis v. Proprietors*, 8 Metc. 326; *Dougherty v. Hughes*, 165 Ill. 384.

The by-law relied upon is contrary to law, and void. *People v. Live Stock Exchange*, 170 Ill. 570; 2 Thompson on Corp. pars. 2236, 2244; *Ohio College v. Rosenthal*, 45 Ohio St. 193; *Railroad Co. v. King*, 17 id. 543; *Durkee v. People*, 155 Ill. 360; *Chicago v. Rumpff*, 45 id. 90.

A guaranteed dividend is limited to the profits made. 23 Am. & Eng. Ency. of Law, (1st ed.) 612, 616; 26 id. (2d ed.) 835; *Taft v. Railroad Co.* 8 R. I. 335; *Lockhart v. VanAlstyne*, 31 Mich. 76; *Guinness v. Land Corp.* L. R. 22 Ch. Div. 349.

Courts of equity will not inquire into the general conduct of directors in the general management of corporate affairs. *Coquard v. Linseed Oil Co.* 171 Ill. 481; *Wheeler v. Steel Co.* 143 id. 197; *Faulds v. Yates*, 57 id. 416.

MR. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

The circuit court of Peoria county sustained the demurrer of the Peoria Law Library Association, a corporation, and other appellees, who are officers of the corporation, to the bill of complaint of Thomas Cratty, the appellant, and dismissed the bill. The Appellate Court for the Second District affirmed the decree.

The bill is for an accounting between complainant, as the owner of twenty-one shares of the capital stock of the corporation, of the par value of \$2100, and the corporation and its officers, and for a decree for whatever may be found due for dividends upon said shares, and for the appointment of a receiver, and to dissolve the corporation and wind up its affairs.

The facts stated in the bill, which for the purposes of the demurrer are to be taken as true, are as follows: Complainant, who was an attorney practicing law in the city of Peoria, had accumulated a large and valuable law library, and with a considerable number of other lawyers agreed to organize a corporation and establish a more public library. Law books transferred to the corporation were to be appraised at their fair cash value, and such as were not paid for in money were to be paid for in capital stock, which was to draw a definite sum per annum as dividends. An agreement to that effect was made in writing, and in pursuance of the agreement the

corporation was organized on January 6, 1879. Soon after the board of directors adopted a set of by-laws, among which were the following :

"Sec. 12. The association guarantees to every stockholder a dividend of eight per cent per annum on the amount of paid-in stock held by him or them from the date of such payment, which dividend shall be a charge against the association, and the production of the certificate of stock or receipt of payment shall entitle the holder to the amount of such dividend. Such dividend shall be due and payable on the first day of January in each year.

"Sec. 15. The board of directors shall fix the annual dues of members at such an amount as may be necessary to raise a sufficient sum, annually, to pay, first, a dividend of eight per cent per annum on the paid-in capital stock of the association; second, the necessary expenses of the association; third, to keep up the continuation of all the reports and legal periodicals owned by the association; and fourth, to purchase new books and legal publications. And shall grade membership into four classes, the first to be composed of all practicing attorneys who have been admitted to practice for ten years; the second, those who have been admitted for five years; the third, those who have been admitted less than five years and all attorneys not engaged in practice; and the fourth, of all students and other persons desiring membership.

"Sec. 16. That until otherwise provided by resolution. to be entered upon the records of the association, the annual dues for the respective grades of membership shall be as follows: Members of the first class, \$80; members of the second class, \$60; members of the third class, \$40; members of the fourth class, \$20."

In pursuance of said agreement and by-laws complainant transferred his library, amounting to nearly two thousand volumes, to the corporation, and received payment, partly in money and the balance in twenty-one shares of the capital

stock of the par value of \$100 each. So long as he remained in practice in Peoria he paid all dues at the rate of \$80 per year and received eight per cent per annum on his shares of stock. He left there on May 1, 1880, and since that time has not received any payment, but the corporation for many years paid dividends to other stockholders who continued to practice in Peoria, the amount of which payments complainant is unable to state. Complainant repeatedly applied to the association and its officers and sought to obtain payment of dividends, but the corporation refused to account with him or make any payment, claiming that there were no surplus funds on hand out of which payments of dividends could be made. The affairs of the corporation have been managed by a few persons who have been engaged in buying up the shares of stock at much less than par value. There has been no meeting of stockholders since January, 1895, although the by-laws provide for annual meetings, and no meeting of directors has been called for several years. The bill charges that large amounts of money have been received by the corporation, out of which the greater portion, if not the entire amount, of dividends could have been paid, but that they were misapplied to the payment of expenses and the purchase of books for the library; that the corporation has been substantially abandoned and is only kept up for the benefit of a few individuals, and that the earnings of surplus funds above the payment of expenses and additions to the library is not a condition precedent to complainant's right to dividends. He therefore asks for an accounting of the amounts of money received by the corporation and its officers and misapplied or misappropriated.

There are allegations in the bill that the charter of the corporation has been forfeited and canceled for a failure to make reports required by the statute, and that under the facts alleged the corporation has no right to continue in operation, and should be wound up and its effects divided among the stockholders. But all such allegations affecting

the franchise were abandoned by taking the appeal to the Appellate Court. The franchise could not be involved in the appeal to that court, and although counsel on both sides have argued the questions relating to the dissolution of the corporation and the forfeiture of its franchise, such questions are not involved in an appeal from the judgment of the Appellate Court, which could not consider or decide them.

Counsel for appellees say that appellant has no standing in a court of equity because he has a complete remedy at law by an action for any dividends that may be due him, but as no dividends have been declared an action at law would not lie to collect them. When dividends have been regularly declared they become the absolute property of the stockholders, and the debt may be collected by an action at law. A proceeding to compel directors to declare and pay a dividend is of an equitable nature, and a court of equity is the proper tribunal in which to institute the action. (Cook on Stock and Stockholders,—2d ed.—sec. 544; 9 Am. & Eng. Ency. of Law,—2d ed.—687.) Generally, the question of declaring a dividend is entrusted to the sound discretion of the directors; and as to common stock, such discretion will not be interfered with by a court of equity in the absence of bad faith or arbitrary or unjustifiable conduct. But different rules apply with respect to the right of holders of preferred stock to invoke the aid of a court to order the declaration and payment of dividends on their stock. (9 Am. & Eng. Ency. of Law, *supra*.)

There is another ground for equitable interference in the bill. Dividends among stockholders of the same class must always be equal and without discrimination, and a bill in equity may be maintained by a stockholder to prevent discrimination or unequal or unfair distribution. (Cook on Stock and Stockholders, sec. 542.) The bill alleges that there has been discrimination in the payment of dividends as between different stockholders of the same class, and such action is not within the discretion of the officers.

The by-laws in question operate as a contract between the corporation and the shareholders, who took their shares in reliance upon them. (10 Cyc. 651.) The meaning of the contract created by the by-laws is not obscure, and it is both usual and proper to assume that parties intend by their engagements what the language used by them naturally imports. The contract is that dividends of eight per cent per annum shall be paid on the shares of stock; that the board of directors shall fix the annual dues at such amounts as may be necessary to raise a sum sufficient to pay, first, the dividends; second, the necessary expenses; third, to keep up the continuation of all reports and periodicals; fourth, to purchase new books and legal publications. There is no objection to an agreement for preferred or guaranteed stock in the original organization of a corporation, where, as in this case, all the parties agree to it. Whether the stock is to be called interest-bearing stock, preferred stock or guaranteed stock makes no difference, as the terms, when applied to shares of stock, mean practically the same thing. (Cook on Stock and Stockholders, sec. 538.) The contract, like any other one, is not to be abrogated or set aside by construction, on the ground that the performance of it would be inconvenient or unfavorable to either one of the contracting parties. Where the rights of third persons do not intervene, parties to a contract are bound to carry it out as they have made it, and the proper function of courts is to enforce the performance of contracts voluntarily entered into without fraud, which are not in violation of the law. The fact that the performance of a contract might lead to insolvency has never been considered any excuse for a failure to perform it. It certainly cannot be said that the parties to this contract intended that it should not be performed if the corporation preferred to expend its net income in increasing the capital or assets by adding to the library and rendering it more useful and valuable. That would enable the officers not to perform the contract at all, at their own option.

There is one particular in which the contract is in violation of the law and not enforceable, and that is in the provision to pay dividends before the payment of necessary expenses and keeping the capital intact/which would include necessary re-binding and otherwise keeping the library up to the point that the capital stock would not be impaired. An agreement to pay dividends out of the capital stock, which amounts to the same thing as to pay back to the shareholder a part of the capital paid by him, is illegal and void. (Cook on Stock and Stockholders, sec. 270; 9 Am. & Eng. Ency. of Law,—2d ed.—701.) The officers of a corporation have no power to decrease the capital of the corporation in order to pay dividends, but, on the other hand, a construction cannot be adopted which would permit the officers to add to the library so as to increase the value of the capital at the expense of the shareholder and in violation of the contract. It was evidently contemplated that dues could be fixed at such a price as to pay all the obligations and fulfill all the purposes named in the by-laws, to the extent of purchasing necessary new law books and periodicals. It may be that experience has shown that the contract interferes to some extent with the full development of a complete library by the addition of new books, thereby increasing its value and adding to the capital, but that fact affords no excuse for failure to perform the agreement so far as it is legal and valid. Scarcely any library contains all the books and periodicals that are published, and there is practically no limit to which the corporation might not go in expending its income for the purchase of books and legal journals, but an increase of the capital cannot be permitted to defeat the rights of shareholders. Such increase of capital could only be effected by the sale of capital stock or some other method which would not interfere with the rights of complainant. His rights are to dividends from the net income, and net income is what remains after deducting all legitimate charges as herein explained. | We see no reason why the contract

should not be enforced by applying to the payment of dividends the net income after deducting the expenses for conducting the library, and for losses and deterioration of books, so as to keep the capital intact and unimpaired. Whether the library would be less useful or valuable as a result of doing so than it otherwise would be cannot be considered.

It is urged that the claim of complainant is barred by *laches*. That doctrine cannot apply to violations of duty on the part of officers which have occurred within a few years prior to filing the bill. The bill alleges that complainant never acquiesced in the construction put upon the by-laws by the officers, and that he has repeatedly sought an accounting and never abandoned his right to it. It cannot be said that there has been such acquiescence on his part as would deprive him of all his rights, and there has been no injury to the corporation or its officers by the delay in filing the bill. The allegations of the bill are that the corporation and its officers are still disregarding the rights of the complainant by adding to the library; that there has been no meeting of stockholders since 1895; that no meeting of directors has been called for several years, and that the defendants, other than the corporation, have been engaged in buying up the shares of stock at reduced prices, so that the library is now maintained only for the benefit of a few individuals. The directors hold a fiduciary relation toward the stockholders, and we are not prepared to say that the complainant is barred of his rights by *laches*.

The judgment of the Appellate Court and the decree of the circuit court are reversed and the cause is remanded to the circuit court with directions to overrule the demurrer.

Reversed and remanded.

HERMAN FRY

v.

HENRIETTA RADZINSKI *et al.**Opinion filed February 21, 1906.*

1. GARNISHMENT—*judgment against garnishee may be rendered at term subsequent to judgment in attachment.* A judgment against the garnishee, either in favor of the plaintiff in the attachment suit or of the adverse claimant, may be rendered at a term subsequent to the rendition of the attachment judgment.

2. SAME—*adverse claimant may interplead after judgment in attachment.* An adverse claimant may interplead in a garnishment proceeding after the term at which the attachment judgment was rendered and before the judgment is rendered against the garnishee, if he had no notice or knowledge of the attachment proceeding until after the term at which the attachment judgment was rendered. (*Juilliard & Co. v. May*, 130 Ill. 87, and *Springer v. Bigford*, 160 id. 495, qualified.)

3. INJUNCTION—*when bill to enjoin collection of a judgment against garnishee is defective.* A bill to enjoin collection of a judgment against a garnishee in attachment which alleges want of notice by complainant until after the attachment judgment was rendered, is defective in failing to allege such want of notice continued until after the expiration of the term at which the judgment was rendered against the garnishee.

4. SAME—*appeal from interlocutory order granting injunction does not remove case from lower court.* An appeal from an interlocutory order granting an injunction does not remove the cause from the trial court, and the latter may, upon dissolution of the injunction by the Appellate Court, take steps to assess damages without the filing of any mandate, since section 83 of the Practice act, requiring a mandate to be filed and notice to be given before the cause is re-instated, applies only where the appeal is from a final judgment.

5. SAME—*lower court may assess damages though the Appellate Court dissolves injunction.* A court of chancery may hear evidence and assess damages, under section 12 of the Injunction act, notwithstanding the injunction is dissolved by the Appellate Court on appeal, instead of by the court of chancery itself.

6. SAME—*when assessment of damages is not premature.* When an injunction is the only relief sought and it is dissolved upon mo-

tion, an assessment of damages at once is not premature, where the court at the same time sustains a demurrer to the bill for want of equity upon its face, and, upon the defendant electing to abide by his demurrer, dismisses the bill.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. R. S. TUTHILL, Judge, presiding.

This is a bill, filed in the circuit court of Cook county on April 6, 1903, by appellant against the appellees as defendants, asking for an injunction, restraining Henrietta Radzinski from collecting two judgments, recovered by her against the New York Life Insurance Company, as garnishee, in two attachment suits, numbered 172,898 and 180,265, and that the New York Life Insurance Company be restrained from paying out and disposing of any money in its possession, claimed to be due on the policy of insurance No. 168,588, until the further order of the court; and that, upon final hearing, said insurance company might be decreed to deliver to appellant whatever sums of money might be found to be due on the policy of insurance, etc. On April 9, 1903, an injunction was granted substantially in accordance with the prayer of the bill upon the filing of a bond in the penal sum of \$8250.00. A motion was made by Radzinski to dissolve the injunction; and on April 24, 1903, this motion was by agreement referred to a master in chancery to hear and determine the same, and report his decision thereon. On April 29, 1903, the master made his report, recommending that the motion to dissolve theretofore made be overruled for the present, and that the ultimate ruling thereon be reserved until the final hearing of the whole matter. On April 30, 1903, an order was entered, denying the motion to dissolve the injunction and approving the report of the master. Thereupon the appellee, Radzinski, took an appeal from the interlocutory order, refusing to dissolve the injunction,

and confirming the master's report, to the Appellate Court. The Appellate Court first affirmed the order of the circuit court, but subsequently granted a rehearing, and on January 19, 1904, reversed the order of the circuit court granting the injunction. The appeal bond, upon the appeal to the Appellate Court from said interlocutory order, was filed on May 1, 1903, in the circuit court. On May 7, 1903, appellee, Radzinski filed a general demurrer to the bill, and on the same day the New York Life Insurance Company filed a general demurrer to the bill.

On March 8, 1904, the cause came on to be heard before the circuit court upon the motion of appellee, Radzinski, to assess her damages on the dissolution of the injunction; and also at the same time the cause came on for hearing upon the demurrers filed to the bill; and the court, thereupon, rendered a decree, adjudging the damages, exclusive of the judgment enjoined and of the costs assessed, at the sum of \$415.00, and ordered judgment for that amount with execution therefor; and, after the damages were so assessed, the court sustained each of said demurrers, whereupon the appellant, complainant below, elected to stand by his bill; and it was, therefore, decreed that the bill be dismissed for want of equity, and that appellees recover their costs from appellant. Thereupon, appellant prayed an appeal to the Appellate Court. The Appellate Court affirmed the decree entered by the circuit court in March, 1904, and the present appeal is prosecuted from such judgment of affirmance.

The bill alleges that, on September 15, 1896, Frederick H. Franke and Adolphine Franke, his wife, delivered to the appellant a policy of insurance, issued on the life of Frederick Franke by said insurance company, No. 168,588, as security for \$5000.00, loaned by the appellant to Frederick Franke; that, at the time of such delivery, it was agreed by Franke and his wife that appellant should hold said policy as security for said loan, until the payment of the same, or until the policy should become due; that afterwards, on Sep-

tember 9, 1897, Franke and wife executed and delivered to the appellant a written assignment of said policy, a copy of which said written assignment is attached to the bill, and written upon it are the words: "Received, Dec. 21, 1897, Home Office;" that appellant ever since such delivery has remained in possession and control of said policy; that the same has not been redeemed by Franke, nor has the money so loaned been re-paid to appellant, but, with interest, is still due; that, on July 15, 1897, appellee, Radzinski, commenced an attachment suit in the circuit court of Cook county to recover \$2160.00, and caused an attachment writ to be served on said insurance company as garnishee; that, on August 5, 1897, the insurance company answered, and admitted that it had issued the policy on Franke's life, and that, by the terms thereof, insurance would mature and become payable on February 26, 1903, and then be of the value of about \$4150.00, copy of which answer is attached to and made a part of the bill; that, on June 6, 1900, judgment was rendered by default against Franke and wife in said attachment suit for \$2520.00; that, on June (January) 20, 1898, Radzinski began another suit in attachment against the Frankes to recover \$2160.00, which attachment writ was served on said insurance company as garnishee, and afterwards on February 28, 1898, the insurance company filed its answer, but it is alleged in the bill that said answer was not on file, and could not be found; that, on June 7, 1900, judgment was rendered by default against the Frankes in said attachment suit for \$2520.00

The bill then alleges that the insurance company neglected, in its answer in the last attachment suit, to show that notice of an assignment of said policy was served on it September 9, 1897, but alleges that the insurance company had knowledge of said assignment, and refers to the copy thereof attached to the bill; that on April 3, 1903, the New York Life Insurance Company filed an amended answer as garnishee in said attachment suits, copies of which are attached

to and made a part of the bill; that, on April 3, 1903, judgment was rendered against the insurance company in each of said attachment suits, ordering it to pay over and deliver to Radzinski money and premiums due on said policy, which judgment was continued, with leave to the company to show cause within five days why it should not stand. The bill then alleges that appellant had and still holds a valid and prior lien on said policy, so attached by Radzinski in said attachment suit, and in equity and good conscience ought to be awarded the premiums due thereon; that appellant "had no knowledge of a rendition of the judgments in said attachment suits against Frederick Franke and Adolphine Franke, until long after the term of court, at which the said judgments were rendered, had passed, and is, and was, therefore, by reason thereof, precluded from coming into court and setting up his claim, by interpleader or otherwise in said attachment suits, for the purpose of defending his rights and claims to the premiums, now due on said policy of insurance." The bill further alleges that the complainant therein is without a legal and adequate remedy at law to establish his claim to the premiums due and to become due on the policy, and has been without the same ever since he had notice of the judgment in the attachment suit, and is powerless to prevent in any legal proceedings the collection of the judgments against said garnishee.

The answer of the insurance company as garnishee in the attachment suits, filed in August, 1897, admits the issuance of the policy, amounting to \$5000.00 on the ten-payment life twenty-year tontine plan, annual premium \$239.90; that premiums were paid up to and through February, 1893, at which time it became a paid up policy for \$5000.00 in case of death; that the policy is assigned on the books of the insurance company by F. H. Franke to Adolphine Franke, his wife, and by the terms thereof the tontine benefits revert to the insured in the event of the prior death of Adolphine Franke; that there is no record on file of any other assign-

ment; that the policy will become due at the death of Franke before the end of the tontine period, which is 1903; that the cash value would be \$4150.00.

The amended answers of the insurance company as garnishee, made April 1, 1903, in both attachment suits, set up that, since the filing of the former answer by the insurance company, said policy has matured, and the cash value of the same is \$4151.95, which the company holds ready to pay to any party entitled to it; that on April 1, 1903, the company was served with a notice by appellant that heretofore, to-wit, on September 15, 1896, the Frankes assigned and delivered to Fry said policy as security for a loan, and that, afterwards on September 9, 1897, the Frankes executed and delivered to Fry a written assignment; the terms of which said notice are set forth in the amended answer. The garnishee then states in its answer that it holds said money for said Fry as assignee, and insists that it has not in its possession any moneys or other property, belonging to either of the said Frankes, subject to the judgment of the court.

WILLIAM E. HUGHES, for appellant.

NEWMAN, NORTHRUP, LEVINSON & BECKER, C. E. CLEVELAND, EDWARD O'BRYAN, and WILLIAM N. MARSHALL, for appellees.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

First—The first point made by the appellant is, that the circuit court erred in sustaining the general demurrers to the bill, and dismissing the same for want of equity.

The controversy in the case is as to the money due upon the policy of insurance issued by the New York Life Insurance Company on February 26, 1883, upon the life of Frederick H. Franke. Appellant claims that the money should be paid to him, because the policy of insurance was pledged

to him as collateral security for a loan. The appellee, Henrietta Radzinski, claims that she is entitled to the money because of the attachment suits, begun by her against Franke and his wife, in which she obtained judgments for the amounts due her against Franke and his wife, and also obtained judgments against the New York Life Insurance Company as garnishee in said attachment suits.

The hearing upon the merits was had upon demurrers to the bill, resulting in a dismissal of the same for want of equity, and, therefore, the allegations of the bill are admitted to be true, and are treated as true in the consideration of the case. After Radzinski commenced her attachment suits and garnisheed the insurance company, appellant, claiming the money due on the policy, did not intervene or interplead in the attachment suits. Section 29 of the Attachment act provides that "in all cases of attachment, any person, other than the defendant, claiming the property attached, may interplead, verifying his plea by affidavit, without giving bail, but the property attached shall not thereby be replevied; and the court shall immediately (unless good cause be shown by either party for a continuance) direct a jury to be empaneled to inquire into the right of property." (1 Starr & Cur. Ann. Stat.—2d ed.—p. 462.) Sections 11 and 12 of the Garnishment act also provide for the appearance of a claimant to the fund for the purpose of maintaining his right thereto. (2 Starr & Cur. Ann. Stat.—2d ed.—p. 2062.)

In his bill the appellant gives as a reason why he did not interplead in the attachment suits that he had no knowledge of a rendition of the judgments therein against the debtors "until long after the term of court, at which said judgments were rendered, had passed." It is alleged in the bill that, by reason thereof, appellant was precluded from coming into court, and setting up his claim, by interpleader or otherwise, in said attachment suits for the purpose of defending his rights and claims to the money due on said policy of insurance. The question then arises whether appellant was justi-

fied in failing to interplead in the attachment suits for the reason stated by him, and whether or not, having failed so to interplead, he now has a right to come into a court of equity, and enjoin the collection of the judgments against the garnishee by the attaching creditor.

In *Juilliard & Co. v. May*, 130 Ill. 87, we said (p. 95): "We think that, in analogy to replevin in respect to personal property, which lies after judgment rendered against the defendant in attachment awarding sale, the remedy by interpleader should be held to lie, in respect to both personal and real property, after such judgment, but that, in the nature of things, and from the necessity of the case, it would have to be interposed while the attachment suit was still *in fieri*, which would be during or before the term, at which final judgment is entered against the defendant in the attachment." In *Springer v. Bigford*, 160 Ill. 495, the statement above quoted from the *May case* was approved and endorsed. While, however, it was said in the *May case* that the interpleader should be interposed in the attachment suit during or before the term, at which final judgment is entered against the defendant in the attachment, it was at the same time said: "There is no legal inconsistency and incongruity that the court should render judgment against an attachment defendant, and order a sale of the property levied upon by the writ, and at a subsequent time or term adjudge such property to belong to a person other than such defendant, and order its release." That is to say, the claim of ownership made by an outside party to the fund or property in the hands of the garnishee may be decided after judgment is rendered in the attachment suit against the judgment debtor. In other words, the judgment against the garnishee, either in favor of the plaintiff in the attachment suit or of the adverse claimant, may be rendered after the judgment in the attachment suit and at a subsequent term. In the case at bar, the judgments against the Frankes in the attachment suits were rendered on June 6 and 7, 1900, and were judg-

ments by default. But the judgments in favor of Radzinski against the New York Life Insurance Company as garnishee were not rendered until April 3, 1903, nearly three years after the judgments against the attachment debtor were rendered. The act in regard to garnishment applies, in many of its provisions, to garnishees summoned in attachment proceedings, although the Garnishment act has more particular reference to proceedings after judgment, when execution is returned "no property found." For instance, section 5 of the Garnishment act begins as follows: "When any person is summoned as a garnishee upon any process of attachment or garnishee summons issued out of a court of record, the plaintiff shall * * * exhibit and file all and singular, such allegations and interrogatories in writing," etc. (2 Starr & Cur. Ann. Stat.—2d ed.—p. 2056.) Section 8 of the Garnishment act begins as follows: "When any person shall have been summoned as a garnishee upon any attachment or other writ issued out of any court of record," etc. (Ibid. p. 2060.) Section 10 of the Garnishment act is as follows: "No final judgment shall be entered against a garnishee in any attachment proceeding until the plaintiff shall have recovered a judgment against the defendant in such attachment." (Ibid. p. 2062.) Therefore, the judgment against the garnishee is necessarily recovered subsequently to the rendition of the judgment against the attachment debtor.

The appellant in his bill only alleges that he had no knowledge of the judgments in the attachment suits against the Frankes until long after the term of court, at which said judgments were rendered, had passed. That is to say, he had no knowledge of the rendition of these judgments until long after June 6 and June 7, 1900. It is not, however, alleged in the bill that he did not have knowledge of the attachment proceedings, or of the attachment judgments, before the rendition of the judgments against the insurance company, as garnishee, on April 3, 1903. The plain infer-

ence from the allegations of the bill is that, at some time after June, 1900, and before April 3, 1903, he did have knowledge of the attachment proceedings. The rule that the interpleader could only be interposed while the attachment suit was still *in fieri*, "which would be during or before the term, at which final judgment is entered against the defendant in the attachment," could only be applicable in cases where the party, having a right to interplead, had notice or knowledge of the attachment proceeding. He could not interplead during or before the term, at which the final judgment was entered against the defendant in the attachment, if he had no notice or knowledge whatever that an attachment proceeding was pending. This question did not arise in the *May case*, because, there, the interpleader was filed at the same term, in which the judgment against the attachment debtor was rendered. Nor did it arise in the case of *Springer v. Bigford*, *supra*, because, there, the interpleader, although interposed after the judgment against the attachment debtor, was so interposed at the same term at which the judgment was rendered. Therefore, in the *May* and *Bigford cases*, the adverse claimant, exercising the right to interplead, had notice or knowledge of the attachment proceeding before the expiration of the term, at which the judgment against the defendant in attachment was rendered. Here, the allegation which is admitted by the demurrer to be true, is that appellant, the adverse claimant, had no notice or knowledge during or before such term.

That notice or knowledge on the part of the adverse claimant is material appears from the language of sections 11 and 12 of the Garnishment act. Section 11 is as follows: "If it appears that any goods, chattels, choses in action, credits or effects in the hands of a garnishee are claimed by any other person by force of an assignment from the defendant or otherwise, the court or justice of the peace shall permit such claimant to appear and maintain his right. If he does not voluntarily appear, notice for that purpose shall be

issued and served on him in such manner as the court or justice shall direct." (2 Starr & Cur. Stat.—2d ed.—p. 2062.) Section 12 is as follows: "If such claimant appears he may be admitted as a party to the suit, so far as respects his title to the property in question, and may allege and prove any facts not stated nor denied by the garnishee, and such allegations shall be tried and determined in the manner hereinbefore provided. If such person shall fail to appear after having been served with notice in the manner directed, he shall nevertheless be concluded by the judgment in regard to his claim." (Ibid. 2062.) These sections expressly provide that, when it appears to the court that the money or effects in the hands of the garnishee are claimed by a third person by virtue of an assignment by the debtor, such third person can either come in voluntarily, or, if he does not do so, he must have notice. The judgment against the garnishee is not conclusive as to him, unless he has failed to interplead after having had notice. In the case at bar, the defect in the bill of the appellant is, that he does not state, that he did not have notice before the judgments against the garnishee were rendered, or did not have notice before the expiration of the term at which such judgments were rendered. The amended answers of the garnishee were filed on April 1, 1903, or April 3, 1903. In these amended answers the garnishee set up the fact that it had received notice of the assignment of the policy to appellant. Thereupon the appellant was entitled to have notice and to be brought into court to make known his claim to the fund in question. It does not appear, so far as the bill in the case shows, that he did not have notice after the filing of the amended answers, and if he did have such notice, it was his duty to interplead in the attachment proceeding, and make known the nature of his claim to the fund. The first day of the March term, 1903, of the circuit court of Cook county was March 16, and the last day of said term was April 18. Of this the court takes judicial notice. The judgments

against the insurance company were rendered on April 3, and the present bill of complaint was filed on April 6, twelve days before the expiration of the March term. It follows, therefore, that appellant had notice of the rendition of the judgments against the garnishee in the attachment proceedings before the expiration of the term, at which the judgments against the garnishee were rendered. But neither he, nor the garnishee, nor the attachment debtors, nor the plaintiff in the attachment suits, moved to set aside the judgments against the garnishee, or either of them, or made any effort to appeal therefrom. The bill of the appellant was subject to demurrer, because it did not negative notice on his part before or during the term at which the judgments against the garnishee were rendered, and did not allege that no effort was made to set aside the judgments against the garnishee, or to permit him to come in and set up his claim to the fund.

It is alleged in the bill that in 1897, when the New York Life Insurance Company as garnishee filed its answers in the attachment proceedings, it had knowledge that the Frankes had assigned the insurance policy to the appellant as security for a loan made by the latter. If this allegation is true, then the insurance company, as garnishee, should have set up the fact of such assignment in its answers, and this would have led to the taking of steps to give the appellant notice, and to enable him to come in and interplead. If it be true that appellant was excusable for not interpleading because the term, at which the judgment against the attachment defendant was rendered, had passed, then he would have a remedy at law against the insurance company for its failure to refer to the assignment in question in its answers. In 14 American and English Encyclopedia of Law (2d ed. p. 866,) it is said: "A garnishee, who has notice before answer that the defendant in the action had assigned the debt to another before the process of garnishment was served, must disclose in his answer the fact, that such assignment

had been made, and if he fails to do so, a judgment, charging him as garnishee, will be no defense to an action against him by the assignee of the debt. And where he does not receive such notice until after he has answered, he should at once bring the matter to the attention of the court by supplemental answer." Our statute provides that, when it appears that any third person has a claim to the fund in the hands of the garnishee, notice to such claimant, if he does not appear voluntarily, shall be issued and served upon him in such manner as the court shall direct. The amended answers of the garnishee do show the fact of the pledge of the policy to the appellant, but the bill does not state that notice was not issued and served upon the appellant by the direction of the court. If such notice had been served upon him, it was his duty to interplead, even though the term had passed, at which the judgment against the attachment debtor had been rendered. (14 Am. & Eng. Ency. of Law,—2d ed.—pp. 866, 867, 906-909.)

There is nothing, either in the Attachment act or in the Garnishment act, which provides that the interpleader shall be interposed at any particular time. Sections 11 and 12 of the Garnishment act, which provide that notice must be given to the adverse claimant, do not say that said notice may not be given after the judgment against the attachment defendant, and after the term has passed, at which such judgment has been rendered. The judgment against the garnishee must, by the terms of the statute, be subsequent to the judgment against the attachment debtor. The judgment against the garnishee cannot be rendered, until the issue, made by the interpleader by the adverse claimant, has been disposed of, and, therefore, the question, whether the claim made by the interpleader is valid or not, may of necessity be decided after the term has passed, at which the original attachment judgment was rendered. We are, therefore, of the opinion that it was not sufficient for appellant to allege in his bill that he had no knowledge of the attachment

before or during the term, at which such judgments were rendered, but he should have alleged that he had no knowledge or notice before the expiration of the term, at which the judgments against the garnishee were rendered. The cases of *Juilliard & Co. v. May*, and *Springer v. Bigford*, *supra*, must be so qualified, as that the holding therein made shall apply only to cases, where the adverse claimant has notice or knowledge of the attachment proceeding or judgment before or during the term, at which such judgment is rendered. For the reasons above stated, the court committed no error in sustaining the demurrers to the appellant's bill.

Second—The next and only other question, presented by the record, relates to the assessment of damages, alleged to have been suffered by the appellee upon the dissolution of the injunction.

The first contention on the part of the appellant upon this branch of the case is, that the circuit court had no jurisdiction to determine the claim for an assessment of damages on the dissolution of the injunction, awarded by the circuit court. The basis of this contention is, that an appeal was taken to the Appellate Court from the order, granting the injunction; that such appeal removed the cause from the circuit to the Appellate Court; that, when the Appellate Court reversed the order granting the injunction, and dissolved the injunction, a mandate should have been filed in the circuit court before any proceedings were taken to assess damages; but no mandate was filed. Section 83 of the Practice act provides that, "when any cause or proceeding either at law or in chancery is remanded by the Supreme Court or Appellate Court, as the case may be, for a new trial or hearing by the court, in which such cause was originally tried, the Supreme Court, or Appellate Court, as the case may be, shall issue its mandate, reversing and remanding such cause directly to such trial court; and, upon a transcript of the order of the Supreme Court, or Appellate Court, as the case may be, remanding the same being filed in the

court, in which such cause was originally tried, and not less than ten days' notice thereof being given to the adverse party or his attorney, the cause or proceeding shall be re-instated therein." (3 Starr & Cur. Ann. Stat.—2d ed.—p. 3111.) Section 83 applies to a case, where a final judgment has been rendered, and has no application to such a case as the one at bar. When the appeal is from a final judgment, the case is taken out of the circuit court, and removed to the reviewing court, and is no longer on the docket of the circuit court, but the present appeal is from an interlocutory order granting an injunction. The statute, that provides for an appeal to the Appellate Court from an order granting an injunction, contains the following provision: "The force and effect of such interlocutory order or decree, and the proceedings in the court below, shall not be stayed during the pendency of such appeal. * * * Upon filing of the record in the Appellate Court the same shall there be at once docketed and shall be ready for hearing under the rules of said court, taking precedence of other causes in said court; upon such appeal the Appellate Court may affirm, modify or reverse such interlocutory order or decree, and shall direct such proceedings to be had in the court below as the justice of the case may require." (3 Starr & Cur. Ann. Stat.—2d ed.—p. 3171.) It thus appears that the appeal from the interlocutory order, granting the injunction, did not remove the case from the circuit to the Appellate Court, but the case still remained on the docket of the circuit court, and, therefore, there was no occasion for any proceedings to re-docket or re-instate it.

It is also claimed by the appellant, that damages can only be assessed where the injunction is dissolved by a court of chancery, and that, as the circuit court here did not dissolve the injunction, but the same was dissolved by the Appellate Court, damages could not be assessed by the circuit court. Section 12 of the Injunction act provides as follows: "In all cases where an injunction is dissolved by any court

of chancery in this State, the court, after dissolving such injunction, and before finally disposing of the suit, upon the party claiming damages by reason of such injunction suggesting, in writing, the nature and amount thereof, shall hear evidence and assess such damages as the nature of the case may require, and to equity appertain, to the party damaged by such injunction," etc. (2 Starr & Cur. Ann. Stat.—2d ed.—p. 2146.) The statute, providing for an appeal from an interlocutory order granting an injunction, authorizes the Appellate Court to dissolve the injunction; but it was never the intention of the legislature that the Appellate Court, which is a reviewing court, should take testimony for the purpose of assessing damages upon the dissolution of an injunction. When the Appellate Court dissolves the injunction, it is the duty of the circuit court to hear evidence, and assess the damages. It is a narrow construction of section 12 of the Injunction act to say that it is only the Appellate Court, which can assess the damages after dissolving the injunction. The case stands in precisely the same situation after the reversal by the Appellate Court of the order granting the injunction, as if the circuit court had itself dissolved the injunction. As the case still remains in the circuit court, notwithstanding the appeal to the Appellate Court, the order of reversal, entered by the Appellate Court, merely has the effect of wiping out the order granting the injunction, and the assessment of damages by the circuit court is not inconsistent with the express language of the statute. (*Chicago Dock and Canal Co. v. Garrity*, 115 Ill. 155; *Bolling v. Tate*, 65 Ala. 417; *Garrity & Dreyer v. Chicago and Northwestern Railway Co.* 22 Ill. App. 404.) Nor do we see any reason why, in determining the amount of damages to be assessed, the services of counsel in the Appellate Court upon the appeal from the order granting the injunction cannot be taken into consideration. The amount assessed, \$415.00, is shown by the testimony to be a reasonable fee for the services of counsel in moving to dissolve the

injunction in the circuit court, and attending before the master upon the reference of the motion to dissolve, and following the case to the Appellate Court, where the order granting the injunction was finally reversed. The record shows the making of an abstract for the Appellate Court, the argument of the case before the Appellate Court resulting in an affirmance of the judgment below by the Appellate Court, the filing of a petition for rehearing in the Appellate Court, the granting of the rehearing by that court, and, after the granting of the rehearing, a reversal, as above stated. The weight of the evidence is in favor of a fee of at least \$600.00 but only the sum of \$415.00 was awarded. We think the evidence sustains the action of the court in assessing the damages at this amount.

It is said by counsel that the assessment of damages was premature, and that the court should not have assessed the damages until the final hearing of the cause. The decree or order of the court, entered in March, 1904, shows that there was a final hearing of the cause, because the court dismissed the bill upon demurrer, and, at the same time, assessed the damages arising from the granting of the injunction. The injunction here was dissolved on the face of the bill, and not upon the coming in of an answer, raising a question of fact. When an injunction is the only relief sought, and it is dissolved on motion upon the bill alone, which operates as a demurrer for want of equity, and admits all the facts alleged, the order of dissolution is a final disposition of the case, and the formal dismissal of the bill may regularly follow, but not otherwise. (*Martin v. Jamison*, 39 Ill. App. 248; *Gillett v. Booth*, 6 id. 423.)

The decree of the circuit court of Cook county is affirmed.

Decree affirmed.

O. GENEVIEVE BRAND

v.

THE CONSOLIDATED COAL COMPANY OF ST. LOUIS.

Opinion filed February 21, 1906.

1. PARTITION—*when bill to partition interest in coal cannot be maintained.* A bill to partition coal in place, which alleges a conveyance by complainant to defendant of the right to mine three-fourths of the coal under her lands, cannot be maintained where the bill alleges that the defendant has mined and removed a portion of the coal, the quantity of which is unknown to complainant, instead of alleging that defendant had mined and removed a portion of the three-fourths of the coal it had the right to mine, since there is in such case nothing to show that any part of the three-fourths remained in place under the lands.

2. SAME—*co-tenancy is essential to the right to partition coal in place.* To entitle a complainant to a partition of coal in place, the title to which has been severed from the title to the surface, it must be shown that the complainant and defendant are tenants in common of the coal.

APPEAL from the Circuit Court of Macoupin county;
the Hon. ROBERT B. SHIRLEY, Judge, presiding.

R. E. DORSEY, and PEEBLES & PEEBLES, for appellant.

BELL & BURTON, and FORMAN & WHITNEL, for appellee.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion
of the court:

The circuit court of Macoupin county sustained the demurrer of appellee, the Consolidated Coal Company, to the amended bill of appellant, O. Genevieve Brand, for partition, and appellant having elected to stand by the bill, it was dismissed, and this appeal followed.

We are not obliged to go to any other source than the abstract for a full understanding of the questions to be decided, and in this case the contents of the bill and exhibits have been so meagerly and insufficiently abstracted by ap-

pellant that we would have been justified in affirming the decree on that ground; but waiving the application of the rule, we are of the opinion that the court did not err in sustaining the demurrer and dismissing the bill. The material averments of the bill are, that the complainant was the owner in fee of certain lands, and on August 6, 1884, executed a deed to B. L. Dorsey & Sons, granting and conveying to them the right to mine and remove three-fourths of the coal underlying the said lands; that B. L. Dorsey & Sons formed a corporation called the Dorsey Coal Company; that on September 8, 1886, the corporation conveyed to the defendant, the Consolidated Coal Company, the right to mine and remove three-fourths of the coal in the vein then being mined and worked by the Dorsey Coal Company under said lands, with a provision that the defendant should so mine the coal as to leave at least one-fourth of all of said vein in position and place as would sufficiently support the surface of said lands, so as to prevent injury thereto or to buildings thereon, and that defendant had mined and removed a portion of said coal, the exact amount of which or the area from which the coal had been removed being unknown to the complainant. The conclusions of law set up in the bill were, that the effect of said conveyances was to vest in defendant the title to three-fourths of the coal underlying said lands, and that as to said coal complainant became a tenant in common with the defendant. She stated that for the purpose of a partition of the coal she elected to treat her undivided one-fourth as severed from the surface and constituting a separate estate, and she prayed for a partition of the coal underlying the land between herself and defendant.

Coal in place underlying land and constituting a substratum of the real estate is itself real estate which may be severed from the surface, and the title thereto may be in one person while the right and title to the surface are in another. In case of such a severance there are two separate estates, each of which may be conveyed by deed or devised by will,

or may pass to the heir under the statutes of descent. (*In re Major*, 134 Ill. 19.) Tenants in common of coal beneath the soil which has been severed from the surface are entitled to a partition, but they must be tenants in common to have that right. (*McConnell v. Pierce*, 210 Ill. 627.) In this case the complainant conveyed the right to mine and remove three-fourths of the coal under the lands, and was still the owner of the remaining one-fourth and the surface, which together constituted a single estate. There may be a severance by conveyance or adverse possession, but there had been no severance of the estate of the complainant in the coal from her estate in the surface. It has been held that the court, in a partition proceeding, may, with the consent of the parties, sever the underlying coal from the surface and give the surface to one and the coal to another. (*Ames v. Ames*, 160 Ill. 599.) But in this case no consent of the defendant to a severance was alleged. It is apparent that the averments of the bill raise questions whether complainant was a tenant in common with the defendant while her one-fourth had not been severed from the surface except by her election to treat it as severed for the purpose of a partition, and while the only right of defendant, under its conveyance from the Dorsey Coal Company, was to mine and remove three-fourths of the coal and to leave one-fourth in place as a support to the surface. These questions have been argued by counsel, but we do not consider it necessary to decide them, for the reason that the bill does not show that the three-fourths of the coal, or any part of it, is real estate still in place under the soil. The deed of the Dorsey Coal Company, made about nineteen years ago, shows that the corporation was then mining the coal, and the bill avers that the defendant mined and removed a portion of the coal under the land, the amount and area of which were unknown to the complainant. The averment being that the defendant has mined and removed a portion of the coal underlying the surface, and not merely a portion of the three-fourths which

it had a right to mine and remove, there is nothing from which the court could say that any of the three-fourths remained in place under the lands. There could be no partition of coal that had been removed, and the bill fails to allege that there is anything remaining to be partitioned, and therefore fails to show that complainant and defendant are tenants in common of the coal.

The decree is affirmed.

Decree affirmed.

LOUIS J. HANCHETT

v.

ERNEST HAAS.

Opinion filed February 21, 1906.

1. APPEALS AND ERRORS—*reasons given for overruling a motion for new trial have no legal effect.* The fact that the trial court, on motion for new trial, offered to enter a *remititur* if the defendant would pay a certain portion of the judgment and waive his right to appeal cannot be urged as error in the Supreme Court, where the record shows the motion for a new trial was unconditionally overruled, and the Appellate Court, by its judgment of affirmance, has determined that the verdict was not excessive.

2. TRIAL—it is not error to permit jury to take declaration to jury room. It is not error to permit the jury to take the declaration with them upon their retirement to the jury room to consider their verdict.

3. INSTRUCTIONS—*when an instruction as to burden of proof is proper.* An instruction is proper which states that, while the burden of proof is on the plaintiff, "still if the jury find that the evidence bearing upon the plaintiff's case preponderates in his favor, although slightly, it would be sufficient for the jury to find the issues in his favor."

4. SAME—*when instruction upon question of plaintiff's interest as affecting his testimony is proper.* An instruction in a personal injury case may properly state that the plaintiff is a competent witness in his own behalf and the jury have no right to refuse to consider his evidence, but that they are judges of his credibility, the same as of other witnesses, and may consider that he is interested, and determine whether his testimony has been affected by that fact.

5. SAME—*when instruction as to discrediting testimony is not erroneous.* An instruction holding that "it is only in cases where a witness has willfully and corruptly testified falsely to a material matter, and is not corroborated by other credible evidence, that the jury is warranted in disregarding his or her testimony," is not erroneous in using the expression "willfully and corruptly" instead of "*willfully or corruptly.*"

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JESSE HOLDOM, Judge, presiding.

ALDEN, LATHAM & YOUNG, for appellant.

THEODORE G. CASE, and JOHN T. MURRAY, for appellee.

Mr. JUSTICE WILKIN delivered the opinion of the court:

This is an action on the case commenced in the superior court of Cook county by the appellee, against the appellant, to recover for personal injuries.

At about six o'clock on the evening of April 3, 1900, Ernest Haas, a boy fourteen years old, alighted from a street car at the corner of Indiana avenue and Forty-Third street, in the city of Chicago, and started north-westerly towards the sidewalk. Appellant was driving a horse attached to a buggy eastward on the north side of Forty-Third street. The breast of the horse struck the boy on the head, knocking him down and inflicting the injuries complained of. Upon a trial before the court and a jury judgment was rendered in favor of appellee, which has been affirmed by the Appellate Court, and this further appeal is prosecuted.

At the time the motion for a new trial was argued in the superior court a colloquy took place between the judge and the respective attorneys concerning the amount of the verdict and the merits of the case. The court expressed the opinion that the amount was excessive but that he did not desire to grant a new trial. The motion was finally overruled, and the court remarked that if, at any time during the

term, counsel for appellant would come into court and agree to pay \$1500 and not appeal the case the judgment would be set aside, a *remittitur* of \$500 entered and a new judgment rendered for \$1500, which was to be satisfied without appeal. It is insisted by appellant that it was error for the court to thus attempt to compel appellant to waive his right to an appeal before entering the *remittitur*. We are unable to perceive how this point can be raised on this appeal. The remarks of the court and the condition upon which the judgment was to be set aside form no part of the rulings of the court. As shown by the record, the motion for a new trial was unconditionally overruled. The fact that the judge may have entertained certain views concerning the merits of the case could have no legal effect upon his rulings, which were wholly unqualified. If he considered the verdict excessive it was his duty to require a *remittitur* or grant the motion for a new trial. The question whether the judgment is excessive is one of fact, upon which the finding of the Appellate Court is final. That court expressly passed upon the amount of this judgment and held that it was not excessive. With that conclusion we cannot interfere.

It is insisted that it was error for the court to permit the jury to take the declaration into the jury room upon their retirement. In this there was no reversible error. *City of East Dubuque v. Burhyte*, 173 Ill. 553.

It is again urged that the trial court erred in giving the third, sixth and tenth instructions on behalf of the appellee. The third is to the effect that while the burden of proof is upon the plaintiff, "still, if the jury find that the evidence bearing upon the plaintiff's case preponderates in his favor, although slightly, it would be sufficient for the jury to find the issues in his favor." This instruction, in effect, has been approved by this court in *Taylor v. Felsing*, 164 Ill. 331, and *Chicago City Railway Co. v. Bundy*, 210 id. 39. It seems to be an exact copy of the one under consideration in the latter case.

The sixth instruction informed the jury that the plaintiff was a competent witness in his own behalf and that the jury had no right to refuse to consider his evidence, but in determining its weight they had the right to consider that he was interested and determine whether his testimony had been affected by that fact; that they were the judges of his credibility, the same as in case of any other witness. This instruction also has been approved by this court in *North Chicago Street Railroad Co. v. Anderson*, 176 Ill. 635, and we regard it free from substantial objection.

The tenth instruction directed the jury that in passing upon the credibility of the testimony of the several witnesses they should reconcile all the different parts of the evidence, if possible; that "it is only in cases where a witness has willfully and corruptly testified falsely as to some material matter, and is not corroborated by other credible evidence, that the jury is warranted in disregarding his or her testimony. Although a witness may be mistaken as to some part of his or her evidence, it does not follow, as a matter of law, that he or she has willfully told an untruth or that the jury would have the right to reject his or her entire testimony," etc. The objection to this instruction is, that it uses the words "willfully *and* corruptly," whereas it is said, "if a witness has either willfully *or* corruptly testified falsely," etc., the jury may disregard his or her testimony. It is well settled that it is not enough that a witness may have testified falsely to justify the jury in ignoring his evidence, because he may have done so through mistake. The exact question here raised has never been passed upon by this court, but we are clearly of the opinion that the criticism is without force. The instruction would, we think, have been good if it had used only the word "willfully," but the addition of the word "corruptly" did not make it bad. If a witness swears willfully falsely, he must have done so corruptly. In order to justify a jury in disregarding the testimony of a witness it must first appear that such testimony is false, and then if the jury

believe that it was willfully so they may disregard it, except in so far as corroborated. The instruction as given could not have misled the jury to the prejudice of the defendant.

It is finally insisted that the trial court erred in refusing to give certain instructions asked on behalf of the defendant. From an examination of the series of instructions given at his request we think those refused, in so far as they announced correct principles of law, were covered by those given. The instructions, taken as a whole, fairly presented the case to the jury, and no prejudicial error was committed either in the giving or refusing of instructions.

There are no reversible errors of law in this record, and the judgment must be affirmed. *Judgment affirmed.*

MICHAEL G. ENRIGHT

v.

ESTELLA A. GIBSON.

Opinion filed February 21, 1906.

1. FALSE IMPRISONMENT—*a private citizen must prove guilt to justify arrest.* In an action for false imprisonment against a private individual for arresting, or causing an officer to arrest, the plaintiff without a warrant, the defendant can justify the arrest only by showing that a crime was committed and that the plaintiff was guilty of the crime.

2. SAME—*when instructions do not apply to false imprisonment.* Instructions, in an action against a private individual for malicious prosecution and false imprisonment, which hold that it is not necessary for the defendant to prove the actual guilt of the plaintiff if there was probable cause for the arrest and the defendant acted without malice, are not applicable to the count for false imprisonment, and are properly modified by restricting them to the count for malicious prosecution.

3. SAME—*allegation that arrest was without probable cause is surplusage.* An allegation in a count charging the defendant, who is a private individual, with false imprisonment, to the effect that the arrest and imprisonment were without reasonable or probable cause, is surplusage.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. OSCAR E. HEARD, Judge, presiding.

WILLIAM E. MASON, and LEWIS F. MASON, for appellant.

MORSE IVES, and G. I. HAIGHT, for appellee.

Mr. JUSTICE RICKS delivered the opinion of the court:

This was a suit brought by appellee, Estella A. Gibson, against appellant, in the superior court of Cook county. The declaration consisted of two counts. The first count alleged false imprisonment, and the second, malicious prosecution. The cause was tried before a jury, and a verdict rendered for \$5000, \$2500 of which was remitted and judgment entered for the sum of \$2500, from which an appeal was prosecuted to the Appellate Court, where the judgment of the superior court was affirmed, and a further appeal is now prosecuted to this court.

Appellant conducted an employment office in the city of Chicago. Appellee was his clerk and in charge of what is termed by the evidence "the female department." For that department she kept a certain book, which contained merely the list of persons wanting female help, their locations and street numbers, the class of work and the wages proposed to be paid. Appellee had been thus employed about six weeks. On Saturday evening, May 25, 1901, she took the book in question home with her, claiming that it was for the purpose of sewing the covers on the index to it and completing the index to the entries of orders. The appellant suspected that she had taken this book for the purpose of copying and furnishing to his competitors the entries therein contained. He missed the book the same evening that appellee took it and sent a clerk to recall appellee to the office, who claims that when he saw appellee she directed him to return to appellant

and say to appellant that he did not see her. On Sunday afternoon she returned to the office with the book. Appellant was there and requested her to take a seat. She offered to show him the book and to tell him what she had been doing with it. Appellant immediately called an officer, directed him to arrest appellee and accompanied the officer and appellee to the police station, where appellee was confined over night. Appellee claims that the door of the room in which she was detained until the officer arrived was locked, while the evidence on the part of appellant tends to show the contrary. On Monday morning, after appellee had been taken to the police station and confined over night, appellant made a complaint charging appellee with larceny of the book in question. The cause was heard the following day and appellee was discharged, and the suit at bar followed.

Appellant was not an officer, and it is not contended that there is no evidence in the record fairly tending to support the first count, being the count for false imprisonment.

The errors relied upon relate wholly to the instructions. The complaint is, that instructions 16, 17, 18, 19 and 20 offered by appellant were not given as offered, but were modified by the court and given as modified. Instructions 16, 17 and 18 relate to the elements of probable cause and good faith on the part of Enright. The sixteenth, as offered, defined probable cause, and advised the jury that unless they believed that the appellant acted without probable cause and with malice they should find him not guilty. The seventeenth, as offered, advised the jury that the burden of proof was upon appellee to show that the defendant did not have probable cause, and that if she failed to do so the jury should find the defendant not guilty. The eighteenth, as offered, was, in effect, that if Enright acted in good faith, upon evidence, whether true or false, which was sufficient to create in the mind of a reasonably cautious man a reasonable belief of guilt of the plaintiff, then they should find the defendant not guilty. The nineteenth, as offered, was that the plaintiff

must show that the defendant acted without probable cause and with malice, and that if the jury believed, from the evidence, there was probable cause and no malice was shown, they should find the defendant not guilty. The twentieth, as offered, advised the jury that it was not necessary for appellant to prove the actual guilt of appellee of the crime of larceny as bailee, but that if he acted upon facts and circumstances known to him, and they were such as would lead a reasonable and prudent man to believe her guilty, and that he did believe her guilty, then the jury should find the defendant not guilty. All these instructions, as offered, were general, and unless modified would be applicable alike to each count of the declaration. The court refused them as offered, and modified each of them by restricting its application to the second count of the declaration. As modified and given they stated correct principles of law applicable to the charge of malicious prosecution.

Counsel for appellant, however, take the position that the instructions are also applicable to the charge of false imprisonment contained in the first count, and in support of that contention cite *Harpham v. Whitney*, 77 Ill. 32, *Bourne v. Stout*, 62 id. 261, *McGuire v. Goodman*, 31 Ill. App. 420, and *Ford v. Buckley*, 68 id. 447. While those cases announce the principle that appellant contends for, they are applied wholly to cases for malicious prosecution, and not to cases for false imprisonment. Not one of the cases cited arose upon the charge of false imprisonment. By the common law, and according to the holdings in many of the States, a private person may justify an arrest by showing that a felony had been actually committed and that he had reasonable grounds to suspect that the person arrested committed the felony. (2 Am. & Eng. Ency. of Law,—2d ed.—885; 3 Cyc. 885, and authorities therein cited.) By section 4 of division 6 of our Criminal Code (Hurd's Stat. 1903, par. 342, p. 677,) it is provided: "An arrest may be made by an officer or by a private person without warrant, for a crimi-

nal offense committed or attempted in his presence, and by an officer, when a criminal offense has in fact been committed and he has reasonable ground for believing that the person to be arrested has committed it."

From the reading of this statute it would seem that there is pointed out a distinction between the power of a citizen to make an arrest and that of an officer. A citizen may arrest when an offense is committed or attempted to be committed in his presence; so, too, may an officer under the same circumstances. But an officer may also arrest where the criminal offense has in fact been committed and he has reasonable grounds for believing the person arrested has committed it. But this latter power is not extended to a citizen by the statute. The policy of the law in this State seems to be that a citizen must not be permitted to take the law into his own hands and to make arrests upon suspicion or upon probable cause of guilt. If the citizen knows a crime has been committed it is his duty to appear before a magistrate and make a complaint, in which he states that the crime has been committed, and in which he may state, upon reasonable information and belief, that the party named is the guilty party, whereupon the magistrate will issue his warrant directed to all sheriffs, coroners and constables in the State, or, in case of emergency or in the absence of such officer, may direct the same to a private individual. When this course is pursued ample protection is given to the citizen who makes the complaint or who may make the arrest under the warrant, and to the accused person named in the warrant. If the private citizen, without observing these formalities of law, may constitute himself an officer and jailer upon mere suspicion or probable cause of guilt of the accused person, it would place in the hands of the vicious or ill-disposed a power the exercise of which might result in a greater evil than might arise from the occasional escape of guilty ~~parties~~ before the officers can be called or the forms of law observed. Such has been the view of this court from an early date, and is clearly ex-

pressed in *Dodds v. Board*, 43 Ill. 95. There Board brought suit against Dodds and others for false imprisonment. Logan, one of the defendants in that suit, attempted to justify by a plea in which he alleged that a larceny had recently been committed in that neighborhood and that he had reasonable ground to believe that the plaintiff was guilty as an accessory to said crime. A demurrer was sustained to this plea, and on appeal this court said: "This plea, as a defense, is defective in not stating that Logan was a peace officer authorized to make arrests of persons guilty of crime, if intended as a justification by such an officer. If intended as a justification as a private individual, it should, to constitute a bar, have averred the guilt of plaintiff. The demurrer was therefore properly sustained to this plea." The other defendants to the suit attempted to justify by a plea stating that they had reasonable ground to suspect that plaintiff was guilty of a larceny which had been recently committed, and that, so suspecting, they induced and caused Logan, who was a peace officer, to make the arrest. A demurrer was sustained to this plea, and of it this court said: "To hold this plea good as a justification to the persons causing the arrest would be to hold that private individuals might arrest on probable cause to believe that the party was guilty, as the arrest thus caused is, in principle, precisely the same as if the arrest had been made by a private person. The mere fact that they induced even an officer, without a warrant, to make the arrest does not protect them. They do not act under the direction of the officer, but he under theirs. Whilst in such a case the officer, acting upon facts reasonably calculated to raise the presumption of guilt, would no doubt be protected, the party causing him to make the arrest would not be unless guilt were shown. There are, no doubt, cases which hold that private individuals may arrest on probable cause, but there are authorities which hold the contrary rule, and in the conflict of authority we are left free to adopt the rule which seems to be most consonant with reason and the public interest; and to prevent

breaches of the peace, and even bloodshed, we think that a private individual should not be justified unless a crime had been committed and the person arrested shall be shown to be the guilty party." We think this case a clear announcement of the rule in this State that before a private citizen can justify an arrest made by him, he must show not only that a crime has in fact been committed, but that the person arrested is guilty of the crime. This case was followed and quoted with approval in *Kindred v. Stitt*, 51 Ill. 401; and to the same effect is *Johnson v. VonKettler*, 84 id. 315. These cases, as we think, are in keeping with the provisions of the statute above quoted. In fact, as we understand it, the statute above was enacted since the rendition of these opinions by this court, and we regard the statute as the enactment of the rule as formulated by this court.]

The instructions, as offered, fall far short of meeting the requirements of the rule as above announced. They contain no reference to the actual commission of a felony or other crime by any person, nor are they predicated in any degree upon the guilt of the appellee of such crime, and therefore, as a justification for the false imprisonment, were wholly insufficient and inapplicable to that count and charge.

Appellant argues that these instructions should have been given because appellee, in the first count of the declaration, alleges that the arrest and false imprisonment were without any reasonable or probable cause. That allegation was not necessary, and doubtless was, as it should have been, treated by the trial court as surplusage. *Johnson v. VonKettler*, *supra*.

We think there was no error in the modification of the instructions, and that the judgment of the Appellate Court should be affirmed, which is accordingly done.

Judgment affirmed.

THE NATIONAL ENAMELING AND STAMPING COMPANY

v.

GEORGE W. McCORKLE.

Opinion filed February 21, 1906.

1. TRIAL—*questions of contributory negligence and assumed risk are not questions of law if evidence is conflicting.* In an action by a servant against the master for injuries received while at work, the questions of contributory negligence and assumed risk are not questions of law for the court where the evidence is conflicting, or where, conceding the plaintiff's evidence to be true, with the inferences that may legitimately be drawn therefrom, reasonable men might differ in their conclusions as to such questions.

2. FELLOW-SERVANTS—*when instruction as to fellow-servants is properly refused.* An instruction which holds that if the plaintiff, who was a carpenter, worked in such a position and so close to the crane-man that he could see how the latter performed his work then the two were fellow-servants, is properly refused, as assuming that such facts would create the relation of fellow-servants even though the crane-man had not seen the carpenter and did not know he was working in the position he occupied, since the relation between servants must be mutual to make them fellow-servants.

3. INSTRUCTIONS—*giving least favorable of two instructions on same subject is not error.* Where two instructions upon the same subject are offered the court is not required to give both, and it is not error if it gives the one the least favorable to the party submitting it.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of Madison county; the Hon. B. R. BURROUGHS, Judge, presiding.

WISE & McNULTY, and McKEIGHAN & WATTS, for appellant.

A. B. GARRETT, and BURTON & WHEELER, for appellee.

Mr. JUSTICE HAND delivered the opinion of the court:

This is an appeal from a judgment of the Appellate Court for the Fourth District affirming a judgment of the circuit court of Madison county in favor of the appellee for the sum of \$1087, for a personal injury alleged to have been sustained by the appellee while in the employ of appellant.

The first contention of the appellant is, that the trial court erred in declining to instruct the jury, at the close of all the evidence, to return a verdict in its favor, on the grounds that the appellee was guilty of contributory negligence and assumed the risk of being injured by the crane which caused his injury.

The manufacturing plant operated by appellant at Granite City, Illinois, consisted of two departments, the "soaking pit" department and the "machine shop" department, and was carried on in a building containing one room 80 feet wide and 145 feet long. The soaking pit department occupied the south half and the machine shop department the north half of said room. In each department there was a large crane, which was operated upon a track laid upon an I-beam situated about twenty feet above the floor, which passed around the outer edge of the space occupied by each department. The appellee, who was a carpenter, in company with another carpenter by the name of Blanford, was set to work by Brueggemann, the foreman in the carpenter department, setting four-by-four studding for a partition lengthwise through said room, to separate the soaking pit department from the machine shop department. The north I-beam upon which the crane track in the "soaking pit" department ran, and the south I-beam upon which the crane track in the machine shop department ran, were near the center of the room and ran parallel to and the edges of the beams came within about eighteen inches of each other, and the top and bottom,—that is, the flanges of the I-beams,—were about twelve inches in width. The studdings were placed under the center of the north beam in the soaking

pit department, and were toe-nailed at the bottom to the floor and fastened at the top to the I-beam with clamps, which were drawn together by a bolt and nut, which bolt passed through the upper end of the studding. At the time appellee was injured he was standing upon the flanges between the I-beams, stooped over, holding to the rail upon the top of the north I-beam with one hand and with the other was tightening a nut upon the end of the bolt which projected through the south side of a studding, and while thus engaged the crane from the machine shop department, which had been standing upon the track west of the place where appellee was working, passed east and ran over his arm, and crushed it in such manner that amputation was necessary above the elbow.

The appellee and Blanford had been at work in another part of the plant, and had, as directed by their foreman, just prior to appellee being injured, returned to the work upon the partition. The foreman notified Blanford, on his return, to look out for the crane, as it was going to do work in the west end of the building. The appellee was absent at that time and was not notified that the crane was going to do work in the west end of the building. The place where appellee was working was poorly lighted, it was very noisy in the building, and the room was filled with smoke and gases from the soaking pit, and the appellee testified that he had never seen the crane on the track west of the point where he was injured prior to his injury, and did not know it was in that part of the building until it ran over his arm, and the operator in charge of the crane testified he did not see the appellee between the I-beams or know he had hold of the rail until after the crane passed over his arm, and appellee and Blanford both testified appellee was performing the work in the usual manner, and had assumed the only position at the time he was injured from which it was possible for him to reach the nut on the south side of the studding and tighten it, and that it was necessary for him to take hold of

the rail with one hand while tightening the nut with the other, to prevent him from falling forward between the I-beams to the floor.

The question of contributory negligence and assumed risk are ordinarily questions of fact to be determined by the jury. Those questions are never presented to the court as questions of law when the evidence is conflicting, as it is here, or when, conceding the testimony on the part of the plaintiff to be true, with the inferences that may legitimately be drawn therefrom, reasonable men might differ upon the questions of whether the injury was caused in consequence of the negligence of the plaintiff or the plaintiff had assumed the risk which was the proximate cause of his injury. In this case the foreman of appellee ordered the crane-man to take his crane to the west end of the room and move a planer. He then directed appellee to go to work on the partition, without notifying him the crane was west of the point where he was to work. He afterwards directed the crane-man to take the crane to the east end of the building. In so doing the crane necessarily passed the point where the appellee was at work. Appellee was not notified of the position of the crane and that it would pass the point where he was at work, nor was the crane-man notified of the presence of appellee, and to avoid injuring him, at the time he was directed to move the crane. By reason of the poor light and the smoke and gas in the room and the noise in the building the appellee did not see or hear the moving crane and the crane-man did not see the appellee. It clearly was for the jury, in view of those facts, to say whether the appellee so far contributed to his injury by his own negligence as to defeat his right to recover, or whether he assumed the risk of being injured by the moving crane when he entered upon the construction of said partition. We think the court did not err in declining to take the case from the jury.

It is next contended the court improperly instructed the jury on behalf of the appellee. The court gave to the jury

upon behalf of the plaintiff but two instructions. The first instruction advised the jury as to the measure of damages in case they returned a verdict in favor of the plaintiff. That instruction is substantially in the same language as an instruction given in the case of *Cicero and Proviso Street Railway Co. v. Brown*, 193 Ill. 274, and which has since been approved in *Chicago Terminal Transfer Railroad Co. v. Gruss*, 200 Ill. 195, and *Chicago and Milwaukee Electric Railway Co. v. Ullrich*, 213 id. 170.

The next instruction given on behalf of the plaintiff informed the jury that the plaintiff was entitled to recover if he had proved, by a preponderance of the evidence, the charge of negligence laid in either count of his declaration, if the jury believed the *defendant* was in the exercise of due care for his safety and that the plaintiff had not assumed the risk of being injured in the manner in which he was injured. It is apparent the plaintiff used the word "defendant" in this instruction where he intended to use the word "plaintiff," as it is clear the instruction was intended to announce to the jury that before the plaintiff could recover he must establish, by a preponderance of the evidence, that the plaintiff, and not the defendant, was in the exercise of due care for the plaintiff's safety. The instruction, therefore, in this particular, is defective. The defendant, however, in several of its instructions given to the jury announced that the plaintiff could not recover unless at the time of the injury he was in the exercise of due care for his own safety. We do not think, therefore, the jury were misled by the giving to them of that instruction in the form in which it was framed. Especially do we think the error in the instruction harmless error as we are of the opinion the jury could not have reached a different verdict from what they did, in view of the evidence found in this record.

The appellant also urges that the court refused proper instructions offered upon its behalf. The first refused instruction offered on behalf of the defendant was covered by

its sixth and seventh instructions which were given, and its second refused instruction was covered by its given instructions Nos. 5, 8 and 12. The court is not required to give to the jury more than one instruction upon a particular subject, and the fact that the court gives to the jury, where two or more instructions are presented upon the same subject, the instruction which is least favorable to the party offering them, is not error.

The third instruction was to the effect that if the plaintiff, "while doing his work, would work in plain view and close to the crane-man and could see how he performed his work," then the plaintiff and the crane-man were fellow-servants. This instruction assumes if plaintiff had knowledge of the presence of the crane-man and the manner in which he operated the crane it would create the relation of fellow-servants between him and the crane-man, even though the crane-man had never seen the appellee and did not know he was engaged in work upon said partition. The relation between the servants must be mutual. It would not be possible for the appellee to be the fellow-servant of the crane-man unless the crane-man was the fellow-servant of appellee. The relation between servants of a common master, in order to create the relation of fellow-servants, must be such that they are brought into such personal relation, either by co-operating in the same work at the time of the injury or by their usual duties, that they may exercise an influence upon each other promotive of their mutual safety. *Pagels v. Meyer*, 193 Ill. 172.

Finding no reversible error in this record the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

THE ALTON RAILWAY, GAS AND ELECTRIC COMPANY

v.

EMMA WEBB.

Opinion filed February 21, 1906.

1. VARIANCE—*alleged variance must be distinctly pointed out.* In order to present the question of variance as one of law for review the objection must be made in the trial court, and the variance must be distinctly pointed out, so that it may be obviated by amendment of the pleadings.

2. STREET RAILWAYS—*what is not negligence per se on part of passenger.* A passenger who, upon the failure of the motorman to heed her signal to stop the car at a certain street, goes to the rear platform to tell the conductor to stop at the next street and remains upon the platform rather than push her way back into the crowded car, is not, as a matter of law, guilty of contributory negligence, although the platform is crowded and the car is running fast, by reason of which the plaintiff is in some way thrown or pushed from the car and injured.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the City Court of Alton; the Hon. ALEXANDER W. HOPE, Judge, presiding.

This is an action on the case, brought in the city court of Alton by Emma Webb, the appellee, against the Alton Railway, Gas and Electric Company, the appellant, to recover damages for a personal injury sustained by appellee by reason of being thrown from a moving street car owned and controlled by appellant in the city of Alton. A trial before a jury resulted in a verdict for \$5000. The plaintiff remitted one-half of this amount. The court overruled a motion for a new trial, made by the defendant, and rendered judgment for \$2500. The defendant appealed to the Appellate Court for the Fourth District, where the judgment of the city court was affirmed. This appeal is prosecuted from that judgment of affirmance.

The evidence shows that shortly before midnight on August 10, 1901, appellee boarded one of appellant's street cars at the village of North Alton in order to ride to Bluff street, in the city of Alton. She lived about two blocks from the place where the car track crosses Bluff street. When she got on the car she took a seat near the middle of the car and next the aisle. The car had a seating capacity for twenty-eight people. It carried sixty-nine people when it started from North Alton on this occasion, and those who could not get seats stood in the aisle and upon the platforms of the car. At the time the plaintiff paid her fare she told the conductor that she wanted to get off at Bluff street. When the car was within a block of that street she pushed a button near her seat, which connected with an electric bell, to notify the conductor that she wanted to get off the car at the next crossing. The bell failed to ring because the motorman of the car had placed a piece of paper back of the switch while the car was waiting at North Alton, in order that the bell could not be rung before the car started, and had neglected to remove the paper. The car did not slacken its speed as it approached Bluff street, and the plaintiff got up from her seat and made her way through the crowded aisle to the rear platform, where the conductor was stationed. She asked him why he did not stop at Bluff street. He inquired whether she had rung the bell, and she replied in the affirmative. He then signaled the motorman to stop at the next crossing. When this signal was given the car had just crossed Bluff street and was going at the rate of from fifteen to twenty miles per hour. Plaintiff did not re-enter the car but waited on the platform for the car to stop, and shortly thereafter was thrown or fell from the rear platform to the ground and was seriously injured. The evidence tends to show that the speed of the car, together with the large number of people on the platforms, caused the car to rock quite violently up and down, especially whenever a low or uneven place in the track was crossed. It further tended

to show that this rocking motion caused the people who were standing to sway and jostle each other, and that because of this condition the plaintiff was thrown or pushed from the car by the crowd on the rear platform, to the ground, at a point about two hundred and twenty-five feet beyond the crossing at Bluff street.

Appellant complains that there was a variance between the declaration and proof, and also assigns error upon the refusal of certain instructions offered by it in the trial court.

LEVI DAVIS, for appellant.

THOMAS F. FERNS, for appellee.

Mr. JUSTICE SCOTT delivered the opinion of the court:

The declaration in this case contains five counts. The appellant says that each count alleges that the plaintiff was thrown from the car to the ground at Bluff street, while the proof shows that the accident did not occur until the car had gone three-fourths of a block beyond Bluff street. It is contended that this discrepancy between the declaration and the proof constitutes a material variance, because the place of the accident is made a matter of essential description by the declaration.

The alleged variance was not pointed out in the city court by any objection to evidence when offered, or by any motion to strike out the evidence on this point after it was admitted and the variance was apparent. Neither was the question raised by offering a peremptory instruction directing the jury to find for the defendant on the ground of a variance, or by offering an instruction directing the jury to disregard the counts of the declaration on that ground. Appellant's contention is that the question was properly raised in the city court and preserved in the record by offering the following instruction which was refused by the court:

"The court instructs the jury that the theory of each of the three counts of plaintiff's amended declaration filed on the 31st day of July, A. D. 1903, is, that plaintiff expected the car to stop at Bluff street, and that she left her seat and went out onto the rear platform of the car before said car reached Bluff street to put herself in a position to alight when the car would stop there, and if the jury believe, from the evidence, that the plaintiff did not leave her seat in the car and go to said rear platform until said car had gone past said Bluff street, and that plaintiff at that time knew that fact but nevertheless went out onto said platform while the car was running at a high rate of speed, then she is not entitled to recover under any of said counts."

This instruction, however, makes no reference to the happening of the accident or to the place where the injury occurred. It only deals with the acts of the plaintiff in going to the rear platform while the car was in motion, and the location of the car, with reference to Bluff street, when the plaintiff left her seat and went to the platform.

In the case of *Libby, McNeill & Libby v. Scherman*, 146 Ill. 540, it is said that in order to present the question of variance as one of law the objection must be made in the trial court and the variance distinctly pointed out, so as to enable the trial judge to pass upon it understandingly, and to enable the plaintiff, if necessary, to obviate the objection by an amendment to the declaration. This course was not pursued by appellant.

The instruction did not call upon the court for any ruling upon the question of a variance between the declaration and proof. It assumed that there was a conflict in the evidence, and advised the jury that if they found, as a matter of fact, that the proof did not sustain the allegations of the declaration in certain particulars then the plaintiff was not entitled to recover. It is manifest that if the instruction had been given it would not have constituted a determination by the city court that there was a variance between the declaration

and proof, and neither can its refusal be deemed a ruling by the court that there was not such a variance.

It follows from what we have said that the question of variance here urged by appellant is not properly before this court for consideration.

It is said that the instruction above quoted stated the law correctly and should have been given. Appellant's tenth and eleventh instructions were also refused. These three instructions are each subject to the same criticism. The tenth instruction would have told the jury that if plaintiff knew that the rear platform was crowded, and with such knowledge went upon the crowded platform, she could not recover. The eleventh instruction stated that if the plaintiff left her seat in the car, where she was in a safe place, and went to the rear platform, where there was a crowd, and the platform, by reason of the moving and jostling of the crowd, was a dangerous place for her, she could not recover.

These instructions invade the province of the jury. The evidence showed that the plaintiff had informed the conductor that she wanted to get off at Bluff street. When the car was within a block of that street she attempted to signal the conductor to stop the car at that street, by pushing a button which had been placed near the seat for that purpose. This proved ineffectual, as the car did not slacken its speed. She then made her way through the crowd standing in the aisle to the rear platform, where the conductor was stationed, and informed him of her desire to alight at Bluff street. The car had then gone too far to stop at that street, but the conductor signaled the motorman to stop at the next crossing. Instead of pushing her way through the crowd back into the car the plaintiff remained on the platform, waiting for the car to stop. While she was in this position she was thrown or pushed from the platform by the swaying and jostling of the crowd, caused by the motion of the car. Whether, under these circumstances, the hypothesis stated in each of the three refused instructions above mentioned

constituted contributory negligence on the part of the plaintiff was a question for the jury, and not one for the court.

The instructions were therefore properly refused.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

JOSEPH E. FREDRICK *et al.*

v.

JOSEPHINE FREDRICK *et al.*

Opinion filed February 21, 1906.

1. *WILLS*—*will construed as to when a request to sell is signed by majority of children.* Where a will requires a majority of the testator's children to sign a written request to the trustee to sell land, neither the trustee nor the party to whom the sale was made, though they are both children of the testator, should be counted in determining whether a majority of the children signed.

2. *SAME*—*tenant in common cannot devise her interest in a specific part of entire property.* Where husband and wife are co-tenants of an entire tract of land, including the part occupied as a homestead, which is not an aliquot part of the entire tract, the wife cannot, as against her co-tenant, devise to other persons "the use of the homestead" during their natural lives.

3. *TRUSTS*—*trustee's actions in conducting sale must be fair to all beneficiaries.* A sale by a trustee of property in which a large number of beneficiaries are interested should not be had without notice to each person interested, and if conducted clandestinely and made to one of the beneficiaries at a low price, without giving any other person a chance to bid, the sale should be set aside.

4. *APPEALS AND ERRORS*—*alleged error in interlocutory action cannot be reviewed.* The action of the trial court in postponing the consideration of the question of equalizing legacies under a will until after a re-sale of the property by the trustee had taken place is interlocutory, merely, and is not subject to review on appeal or writ of error to review the decree ordering the re-sale.

WRIT OF ERROR to the Circuit Court of Will county;
the Hon. DORRANCE DIBELL, Judge, presiding.

KNOX & AKIN, for plaintiffs in error.

DONAHOE & McNAUGHTON, BENJAMIN OLIN, C. W. BROWN, and JAMES A. McKEOWN, for defendants in error.

Per CURIAM: In the year 1900 Joseph and Sarah Fredrick, husband and wife, were the equal joint owners of a tract of seventy-five acres of land, a portion of which was situated within the corporate limits of and the balance adjoined the city of Joliet, in Will county, and upon which they resided as a homestead. Sarah Fredrick died on September 15, and Joseph Fredrick on November 17 of that year, testate, and leaving them surviving eight children, namely, Joseph E. Fredrick, Frank E. Fredrick, Oswald J. Fredrick, Sarah A. Bossom, William W. Fredrick, Josephine Fredrick, Adeline A. Fredrick and Charles A. Fredrick, all adults. William W., Josephine, Adeline A. and Charles A. were unmarried at the time of the death of said Sarah and Joseph Fredrick and made their homes with said Joseph and Sarah Fredrick upon said premises. Sarah Fredrick, by her will, which bore date June 12, 1900, after providing for the payment of her debts and funeral expenses and making certain bequests of her personal property, the validity of which is not here involved, devised said real estate to six of her children, as follows: To Oswald J. an undivided four twenty-eighths interest; to William W. an undivided six twenty-eighths interest; to Josephine an undivided five twenty-eighths interest; to Adeline A. an undivided five twenty-eighths interest, and to Charles A. an undivided four twenty-eighths interest, and provided in the event of either of said children being dead at the time the will went into effect, the share of the deceased child should go to the survivor or survivors of said named children. The remaining four twenty-eighths of said real estate was devised to Charles A. and William W. in trust, as follows:

"That they shall manage the same as their judgments may deem best, to sell, convey and re-invest or otherwise control so as to produce the most satisfactory results by way

of income or investment possible, giving them all the power necessary or requisite for that purpose, and from the principal of said four twenty-eighths ($4/28$), or the income thereof, to pay, from time to time, to my son Frank such a sum or sums as my said trustees shall deem wise or proper, the intent being that my son Frank shall receive no portion thereof excepting such an amount or amounts as my said trustees shall deem best or prudent. And provided further, that in the event of the death of his present wife, Margaret, or in the event of an absolute divorce between them, then my said trustees shall transfer, convey or turn over to my said son Frank such portion of the property so conveyed to them in trust as shall then remain in their hands. In the further event of the death of my said son Frank prior to the death of his said wife and prior to such absolute divorce, then said above property so conveyed in trust I devise and bequeath to my said children, Josephine, Adeline, William, Charles and Oswald, or the survivor or survivors of them, share and share alike. I desire, however, in the contingency of the death of my said son Frank, and that his son Harold be left surviving, that my trustees may, as a purely voluntary matter, pay to my said grandson, son of my said son Frank, such a sum or sums as they may deem prudent or wise. The power and authority conferred upon my said sons as trustees I desire to be exercised by the survivor in the case of the death of one, and in the event of the death of both, either before or after my death, then I desire that some fit person be appointed by a court of competent jurisdiction as such trustee, who shall take title to said four twenty-eighths ($4/28$) of my said real estate, or the proceeds thereof, and be vested with the same power and authority above conferred upon my sons so named as trustees."

By the eighth paragraph of the will, Josephine and Adeline A., or the survivor, were given the use, occupancy and possession of said real estate during the life of their father, Joseph Fredrick, and the wish was expressed by the testa-

trix that William, Charles and Oswald might have a home upon the premises with the daughters, if they so desired.

On August 8, 1900, Sarah Fredrick executed a codicil to her will, which, in part, reads as follows:

"First—I direct and devise the use of the homestead, and all the furniture therein as it now is, to my daughters Josephine and Adeline and my sons William and Charles, to be used, occupied and enjoyed by them during their natural lives, and to the survivor or survivors during his, her or their natural lives, said homestead meaning the house, yard and buildings as now occupied by the family. Subject to this modification and provision only, I desire and direct that my foregoing will stand in all respects as therein written."

Charles A. Fredrick was named as executor therein, and the will and codicil were admitted to probate on February 5, 1901, and Charles A. Fredrick qualified as executor.

Joseph Fredrick, by his will, which bore date December 14, 1893, after directing that his debts and funeral expenses be paid by his executor, gave, devised and bequeathed all the rest, residue and remainder of his estate, real, personal and mixed, to Charles A. Fredrick as trustee, and provided that his wife should have the net income thereof during her life; that after the death of his wife said trustee should handle the estate in such manner as in his opinion would be for the best interests thereof, and that the net income thereof should be added to and become a part of the estate and held in trust by the trustee and distributed by him as provided by the will; that the real estate should not be sold during the life of his wife unless necessary to pay debts or current expenses of the estate, and then only so much should be sold as should be necessary for those purposes.

The fifth paragraph was as follows: "It is my wish that my estate be closed up as soon as it is advantageous so to do, and at all events within ten (10) years after my said wife's death, the time for disposing of my estate to be decided as follows: Whenever, after my said wife's death, all

of my children hereinafter mentioned that are then living and of sound mind and memory shall consent or make written request of my said trustee, he must then convey or otherwise dispose of and distribute the same as soon as favorable opportunity offers; but my said trustee shall also have the power to sell, convey or otherwise dispose of all or any part of my estate at any time or times after my said wife's death, upon the written agreement, request or consent of a majority of said hereinafter mentioned children that are then living and of sound mind and memory, provided it shall, in the opinion of my said trustee, appear expedient or advantageous so to do, it being my intention that in determining the opportune time or times for disposing of my estate upon request or consent of less than all of my said children my said trustee shall concur therein, and no sale or other disposition thereof shall be made unless, in his judgment, it may seem advantageous to the estate so to do, unless by the unanimous request or consent of all my said children, and in that case my said trustee shall have no voice in the matter other than advisory, and shall comply with said request forthwith, when made in writing and signed by all my said children. My purpose in thus providing how the time for the disposal of my estate shall be decided upon is, that the same may not be sacrificed or sold below its value at the election of less than a majority of my said children."

The will then provided when the time arrived for the division of the estate the same should be distributed by the trustee as follows: To Josephine Fredrick, \$1000; to Leonard H. Fredrick, son of Joseph E. Fredrick, \$500; to Oswald J. Fredrick, \$500; to Frank E. Fredrick, \$500; to William W. Fredrick, \$500; to Charles A. Fredrick, \$2000,—said money legacies in all amounting to the sum of \$5000. The testator gives as his reasons for making said bequests, his desire "to equalize among them all advances heretofore made by me, so that with the special bequests and their respective shares in the residue of my estate their inheritance will,

considering former advancements, be as near as may be of equal value."

Paragraph 10 of the will reads: "I direct that all the rest and residue of my estate, both real and personal, shall be distributed by my said trustee between all my following named children, Joseph E. Fredrick, Charles A. Fredrick, Oswald J. Fredrick, Frank E. Fredrick, William W. Fredrick, Sarah Bossom, (wife of Thomas Bossom,) Josephine Fredrick and Addie A. Fredrick, share and share alike: *Provided, however,* that if my said wife shall die testate or shall in any manner distribute her separate estate otherwise than equally between all my said children, then it is my wish, and I hereby direct, that my said trustee shall distribute my estate so as to equalize, in his opinion, as near as possible to each one of my said children any unequal distribution my said wife may make of her separate estate, both real and personal, either before her death or by will, deed, bequest, gift or otherwise, so far as the same may come to the knowledge of my said trustee, it being my intention that my said trustee shall give to each of my said children such portion of my estate as, when added to the amount or value of the portion distributed to each one of said children by my said wife out of her separate estate, shall give to each and all of our said children equal shares from my residue separate estate, and the entire separate estate, both real and personal, of my said wife conjointly to share alike, as near equally as is possible, in the opinion of my said trustee, to make them under the then existing circumstances."

The will further provides: "In case of the death of my said children herein named, previous to the distribution of my estate, the share of my estate to which such deceased child or children would be entitled to under the provisions of this my last will and testament shall be distributed to the lawful heirs or assigns of such deceased child or children."

Charles A. Fredrick was named executor and the will was admitted to probate February 5, 1901, and he qualified

as executor. Prior to February 21, 1901, (the record does not show the exact date,) Frank E. Fredrick, William W. Fredrick, Josephine Fredrick and Adeline A. Fredrick, under the provisions of the fifth paragraph of Joseph Fredrick's will, in writing requested Charles A. Fredrick, as trustee, to sell the real estate of which the said Joseph Fredrick died seized. On that day Charles A. Fredrick, in writing, consented and agreed, as such "trustee and beneficiary," to the sale, and on March 7, 1901, without having conferred with Joseph E. Fredrick, Oswald J. Fredrick or Sarah A. Bossom, or without notice to either of them, he sold the interest of which said Joseph Fredrick died seized in said seventy-five acres, to his brother William W. Fredrick in consideration of the payment to him of the sum of \$11,250, which was at the rate of \$300 per acre, and executed and delivered to William W. Fredrick, as such trustee, a deed conveying the interest of which Joseph Fredrick died seized in said premises to said William W. Fredrick, which deed was filed for record and recorded in the recorder's office of Will county.

On March 7, 1901, the day on which said deed bears date and upon which the sum of \$11,250 was paid to Charles A. Fredrick by William W. Fredrick, Charles A. Fredrick filed a bill in chancery in the circuit court of Will county against all his brothers and sisters and Harold and Leonard H. Fredrick, alleging he had made said sale and had the proceeds arising therefrom in his hands, as trustee; that all the debts against the estate of said Sarah Fredrick, deceased, and Joseph Fredrick, deceased, which consist only of funeral expenses, had been paid; that there was no personal property in his hands belonging to either of said estates; that he desired to distribute, under the terms of the will of Joseph Fredrick, the proceeds of the sale of said real estate between the beneficiaries named in said will; that by reason of the contingent interest of Frank E. Fredrick in Sarah Fredrick's estate, and the interest given to Adeline A. Fredrick, Josephine Fredrick, William W. Fredrick and

Charles A. Fredrick in the portion of said premises belonging to Sarah Fredrick which had been occupied by Joseph and Sarah Fredrick, during their lives, as a homestead, it was uncertain what amount each of the beneficiaries under the will of Sarah Fredrick, deceased, would receive from her estate, and uncertain what the beneficiaries under the will of Joseph Fredrick, deceased, should receive from the moneys in his hands as trustee, and prayed that the wills of Sarah and Joseph Fredrick, deceased, respectively, might be construed and the respective interests of the parties in said fund in his hands derived from the sale of said real estate be determined, to the end that it might be divided and distributed in accordance with the law and the rights of the parties. Answers and replications were filed, and the cause being at issue, on April 17, 1901, Joseph E. Fredrick filed a bill in chancery in the circuit court of said Will county against William W. Fredrick and Charles A. Fredrick, for the purpose of canceling and setting aside the sale to William W. Fredrick by Charles A. Fredrick, as trustee, of the interest of which said Joseph Fredrick, deceased, died seized in said seventy-five acre tract of real estate, on the ground that the sale was made by the trustee without authority, that the consideration received therefor was inadequate and that the sale was made through fraud. Answers and replications were filed, that case being also at issue.

At the May term, 1902, of said circuit court, said cases,—that is, the case begun by Charles A. Fredrick to obtain a construction of the wills of Sarah Fredrick, deceased, and Joseph Fredrick, deceased, and the case commenced by Joseph E. Fredrick to set aside the sale made by Charles A. Fredrick, as trustee, to William W. Fredrick,—were by the order of the court consolidated and from that time forward proceeded in that court as one case, and the court, upon a full hearing in open court, entered a decree canceling and setting aside the sale made by Charles A. Fredrick, as trus-

tee, to William W. Fredrick, and held that the codicil to the will of Sarah Fredrick, deceased, was a valid devise of the undivided one-half part of the premises which had been occupied by her and her husband as a homestead, to the persons named in said codicil during their lives or the survivor thereof, and that Oswald J. Fredrick was the absolute owner of that part of said seventy-five acres upon which he and his family resided, the same being a lot fifty-two and four-twelfths feet wide by one hundred and fifty feet deep, fronting upon Raynor avenue, in the city of Joliet, and that, as subsequent to the setting aside of said sale there were no funds then in the hands of said trustee, as the proceeds of the sale of the real estate of Joseph Fredrick, deceased, to be distributed under the terms of his will and with which to equalize legacies under paragraph 10 of his will, the decision of the question of whether it was possible to equalize the legacies of all the children of Joseph Fredrick, deceased, as directed by his will, so that the amounts received by each of said children from the estates of Sarah and Joseph Fredrick, deceased, should be equal, should be held in abeyance until after a re-sale of said premises, as before a re-sale of said premises should be had such changes might occur as to make it practicable to effect such equalizations, under the provisions of said will, without difficulty; and the court, for the purpose of subsequently disposing of said questions after the re-sale of said premises, retained jurisdiction of the case of Charles A. Fredrick to obtain a construction of said wills, and declined to determine whether or not the provisions of the will of Joseph Fredrick, deceased, requiring the surplus of his estate remaining after the specific legacies therein directed to be paid had been paid, to be used to equalize the legacies received under his will and under the will of Sarah Fredrick, deceased, so that each child would receive an equal amount from the two estates, was a valid provision, or whether it was void by reason of the uncertainty of the provisions made for Frank E. Fredrick in the original will or

by reason of the interests transferred by the codicil to the will of Sarah Fredrick to the children named therein.

Adeline A. Fredrick departed this life testate, subsequent to the commencement of said suits, leaving her surviving as her sole heirs-at-law, her brothers and sisters. By her will, which was admitted to probate July 15, 1901, Charles A. Fredrick was appointed her executor, and thereby she devised to her brothers Charles A. and William W., and her sister Josephine, her entire estate.

A writ of error has been sued out to reverse said decree, and Joseph E. Fredrick, Oswald J. Fredrick and Sarah A. Bossom, the plaintiffs in error, have assigned errors, and Frank E. Fredrick, William W. Fredrick, Josephine Fredrick, Charles A. Fredrick, Harold Fredrick and Leonard H. Fredrick, the defendants in error, have assigned cross-errors, and the contentions of the respective parties will be disposed of regardless of the order in which they are presented in the briefs.

First—In his will Joseph Fredrick expressed a wish that his estate be closed up so soon after his wife's death as it advantageously might be done, and directed that it be closed, in any event, within ten years after her death. He also provided that his real estate might be sold at any time after his wife's death upon the request of all of his children, and that upon the request in writing, to the trustee, of all of his children after his wife's death, it should be the duty of the trustee to make sale of his real estate; and upon a like request in writing, to the trustee, of a majority of his children, if the trustee acquiesced in such request, the trustee should have the power to make sale of the real estate. Joseph Fredrick died November 17, 1900. His wife had died on the preceding 15th day of September. His will was admitted to probate on the 5th day of February, 1901, and prior to the 21st day of that month four of the children, Frank E., Josephine, Adeline A. and William W. Fredrick, requested, in writing, the trustee to sell said real estate. On the 21st

of February Charles A. Fredrick, as trustee and as a beneficiary under his father's will, approved, in writing, said request, and upon the 7th of March following, he sold and conveyed said premises to his brother William W. Fredrick for the sum of \$11,250 by virtue of said request. Josephine, Adeline A., William W. and Charles A. Fredrick lived together upon the premises. Frank E. lived near by, as did Joseph E., Oswald J. and Sarah A. The consent was signed by Frank E., Josephine, Adeline A. and William W. when Charles A. was present. He did not confer with his brothers Joseph E. and Oswald J., or his sister Sarah A., or her husband, with reference to the sale of said premises, but says he carried the request in his pocket for a few days and then signed it, and on the 7th of the following March executed and delivered to William W. Fredrick a deed for said premises and received in cash the consideration for the sale. The request, under the will, was required, in order to authorize a sale, to be signed by at least a majority of the children of Joseph Fredrick, deceased. He left in number eight children, four, only, of whom signed the request. If the trustee is to be counted as having signed, it was then signed by five children. We think, however, when the entire paragraph of the will which provides for the sale upon the request of a majority of the children is read, it is apparent that the testator did not contemplate that Charles A., the trustee, should sign the request as a child and thereby make a majority in favor of a sale and then approve the request as trustee, but that he contemplated that the request should be signed by a majority of his children other than Charles A., the trustee. In determining the number of signatures necessary to authorize a sale Charles A. should therefore be eliminated and the request should be signed by a majority of the remaining children. At the time the request was signed there were seven children, not counting said Charles A. Four of these signed, which would make a majority of the seven. The trial court held, however, and we think correctly, that the sig-

nature of William W. to the request should not be counted, as he was interested in procuring the sale to be made, in the sense that he was the person to whom the sale was to be made.

It is contended that the evidence does not justify the inference that when the consent was presented to the trustee, William W. was to be the purchaser. William W. and Charles A. lived in the same house. No notice of the sale was given to other parties who might have desired to purchase. The brothers and the sister who did not sign the request did not know a sale was contemplated and did not hear of the sale until it was consummated. There was no urgent necessity for an immediate sale. On the day the sale was consummated a bill to determine how the proceeds of the sale should be distributed was filed by Charles A., and William W. and the other parties who signed the request immediately entered their appearances. These facts, and others disclosed by this record, show, we think, that from the time the request was signed until the deed was made the trustee and the parties who requested the sale to be made were acting together and in opposition to the other children, and that it was understood between the trustee and the parties who signed the request that William W., or some other one of their number, should be the purchaser and obtain title to the land from the trustee. The property in question is situated in and immediately adjoins the corporate limits of the city of Joliet. The streets upon the north and east sides of the property are paved. The property located north, east and south of said seventy-five acre tract is subdivided and largely built upon. Street car lines are built from the heart of the city to within a short distance of said property. A large number of witnesses testified as to the value of said real estate at the time of the alleged sale. They fixed the value at from \$250 to \$700 an acre. The court saw and heard the witnesses, and reached the conclusion, which is incorporated in the decree, that the property was well worth all it brought,

and upon a re-sale might bring more than it was sold for by the trustee. The property unquestionably has a value for subdivision purposes, and what property situated similarly to this will bring at an advantageous sale is always problematical and difficult to determine. We think from the evidence it is plain that this property was sold at a very low figure, and that it is but fair to Joseph E., Oswald J. and Sarah A. that the sale should be set aside and the property re-sold after notice to them that a sale is to be made. A trustee should not clandestinely put through a sale of property situated like this, in which a large number of persons are interested, without giving to each person notice of the fact that a sale was contemplated and about to be made, and where a sale is thus made to one of the beneficiaries without giving the other parties in interest a chance to bid on the property or find a purchaser for the property, the sale should be set aside.

Second—It appears that many years ago, and at the time Oswald J. Fredrick was about to be married, Joseph and Sarah Fredrick, who then owned the real estate now in question, gave to him a lot on the east line of said property, fronting upon the street which borders said property upon the east; that they assisted him in measuring the lot; that he took possession thereof and fenced the same and built thereon a house and other improvements, since which time he and his family have resided, and now reside, upon the lot as their home. The court found and decreed that said Oswald J. Fredrick was the owner of said lot in fee, and that in the settlement of the estate of Sarah and Joseph Fredrick, deceased, he ought not to be charged with the value of said lot. It is assigned as cross-error that the portion of the decree which finds said lot to be the property of Oswald J. Fredrick is not supported by the evidence, and in the following particular that cross-error is practically confessed by the plaintiffs in error: It appears from the description of the lot found in the decree that it is about fifty-two feet farther

south, fronting upon Raynor avenue, than the testimony of the witnesses who give its location place it. The decree, therefore, so far as it designates and fixes the location of said lot is not supported by the evidence, and for the error indicated the portion of the decree fixing the location of the lot must be reversed.

Third—It also appears that near the north-west corner of the said seventy-five acre tract, the house, barn, etc., occupied by Joseph and Sarah Fredrick, during their lives, as a home, was situated. That portion of the premises was fenced, and within the fence were located about three or three and one-half acres. This is the portion of the premises covered by the devise to Joseph E., Adeline A., William W. and Charles A. Fredrick for life, contained in the codicil of the will of Sarah Fredrick, deceased. The trial court held the devise contained in the codicil to be valid. But with this we cannot agree. Joseph and Sarah Fredrick were tenants in common of the entire tract of seventy-five acres, including the house, barn and the ground on which they were located. The interest of each was an undivided interest in the whole, treated as an entirety, and not an undivided interest in each of as many parcels as he or she might choose to divide the common property into. Sarah did not own an undivided one-half of the three and one-half acres included in the homestead, any more than she owned an undivided one-half of any other specific part of the entire tract. If a tenant in common desires to dispose of his undivided portion of the common property or any part of such interest, he must do so by conveying the whole or some aliquot part of his undivided interest in all. If one tenant in common attempts to convey the whole or any part of any specific portion of the common estate, such conveyance is void, at least in so far as it is prejudicial to the interest of the other co-tenants. The grantee under such a conveyance may occupy the position of the grantor, but under no circumstance can his rights be any greater. Such a conveyance may be valid as against

the grantor, at least by way of estoppel, but not when such conveyance is prejudicial to the rights of co-tenants. (1 Cooley's Blackstone,—3d ed.—*194, note 13; 4 Kent's Com. 368; 1 Washburn on Real Prop. 417; 3 id. 587; *Peabody v. Minot*, 24 Pick. 329; *Benedict v. Torrent*, 83 Mich. 181; *Markoe v. Wakeman*, 107 Ill. 251.) Under these authorities Sarah Fredrick had no right to dispose of the whole or any portion of the three and one-half acres used as a homestead in such a way as to prejudice the rights of Joseph Fredrick or his beneficiaries. After the devise her devisees had no greater right than she had, and she was without power or authority to create a life estate in them to the detriment of her co-tenant. It certainly cannot be claimed that the life estate was not prejudicial and detrimental to the co-tenant in making an equitable distribution of his part of the property. The value of the life estate, if the devise was valid, would have to be taken into account by the co-tenant or beneficiaries, and would continue until the death of those owning it. This certainly would prejudice the co-tenant and his beneficiaries, and the codicil of the will making this devise was void and the circuit court erred in not so holding.

Fourth—It is finally urged that the court erred in not disposing of the question of the equalization of the legacies of the beneficiaries under the wills of Sarah and Joseph Fredrick, deceased, in accordance with the tenth paragraph of the will of Joseph Fredrick. It is contended, on the one hand, that paragraph 10 of Joseph Fredrick's will cannot be executed, and that it is void by reason of the uncertain amount devised by Sarah Fredrick to Frank E. Fredrick, and by reason of the uncertain value of the estate given by the codicil to the will of Sarah Fredrick to Josephine, Adeline A., William W. and Charles A. Fredrick; that is, by reason of the uncertain amounts which these devisees are to receive from the estate of Sarah Fredrick, deceased, it is impossible to equalize the amounts which said children will receive from the estate of Joseph and Sarah Fredrick when

added together. On the other hand, it is contended that said paragraph 10 is valid and that its execution is a mere question of mathematics. At the time the consideration of the question of the construction to be given to said paragraph 10 was before the lower court there were no funds in the hands of the trustee for distribution under paragraph 10 of Joseph Fredrick's will, and the court found that by the time the real estate had been re-sold by the trustee and there was a fund on hand to be distributed and with which to equalize legacies, such changes may have taken place that the objections to the equalization of said legacies under said paragraph 10 might be entirely removed and in consequence of such changes said paragraph easily capable of execution, in which event it should be executed, and then declined to pass upon the validity of said paragraph but held the question of its validity or the method of its execution, if valid, in abeyance and open for the further consideration and determination of the court. The circuit court was doubtless wise in thus postponing the consideration of that question. If, however, we thought otherwise, we would be powerless to review the action of the court in declining to pass upon and settle those questions at the time that it entered the decree appealed from, as the action of the court in postponing the consideration of those questions was merely interlocutory, and not final, and not subject to review in this court by appeal or writ of error. *Eggleston v. Morrison*, 185 Ill. 577; *Thomson v. Black*, 208 id. 229.

The decree of the circuit court will be affirmed except as to the questions of the devise of the homestead and of the location of the lot decreed to be the property of Oswald J. Fredrick, and as to these questions the decree will be reversed and the cause remanded to the circuit court for further proceedings in accordance with the views herein expressed. Each party will pay his own costs in this court.

Affirmed in part and remanded.

WILEY J. LITTLEJOHN

v.

CHICAGO, EVANSTON AND LAKE SUPERIOR RY. CO. *et al.**Opinion filed February 21, 1906.*

1. RAILROADS—*contract for deed to right of way stands on the same footing as other contracts for deeds.* An agreement with a railroad company for the conveyance of a right of way stands on the same footing as any other contract for conveyance.

2. SAME—*when contract for deed to right of way does not pass title.* A contract to deed a strip of land to a railroad company when it had complied with certain conditions specified and giving the railroad company the right to enter at once for the purpose of complying with the conditions, is a mere license giving the company the right of possession, only, and not title.

3. DEEDS—*intention must be clear to except property included in description from terms of grant.* To except property included in the description in a deed from the terms of the grant the intention to do so must be expressed in clear and certain terms.

4. SAME—*deed construed as not excepting right of way from grant.* A deed to described premises, including the portion in possession of a railroad as its right of way, reciting that it is made subject to the agreement for the right of way, "together with a reversionary right to the center of the streets around said premises, and to the portion used by said railway in case of the vacation of said streets or either of them, and in case the railway company should give up their right aforesaid," does not except the right of way from the terms of the grant.

5. CONTRACTS—*when agreement for right of way may be revoked.* An agreement giving a railway company possession of land for the performance of certain conditions and entitling the company to a deed to the land if the conditions were performed within a specified time is irrevocable up to the time when the conditions should be performed, but after that time, if the conditions have not been performed, the contract may be terminated and the license revoked by the owner or by those claiming through him. (*Sands v. Wacaser*, 149 Ill. 530, distinguished.)

6. SAME—*when right to declare forfeiture is not waived.* Failure of the owner of land to declare a forfeiture of a contract with a railroad company for a deed to a right of way when the time for performing the conditions had expired without any attempt by the railroad company to comply with the contract, and subsequently

permitting the company to take possession of the land for the purpose of performing the conditions, does not waive the owner's right to forfeit the contract for breach of conditions after the company has had ample time to perform.

7. REAL PROPERTY—*when law relating to estates upon condition subsequent does not apply.* The law in regard to estates upon condition subsequent has no application where a railroad company is in possession of land under agreement for a deed to the same, but has never had a deed and has not complied with the conditions of the agreement entitling it to demand a deed.

APPEAL from the Superior Court of Cook county; the Hon. ROBERT W. WRIGHT, Judge, presiding.

The appellant, Wiley J. Littlejohn, on June 16, 1903, brought an action of ejectment in the superior court of Cook county against Chicago, Evanston and Lake Superior Railway Company, Chicago, Milwaukee and St. Paul Railway Company, and Chicago and Milwaukee Electric Railway Company, appellees, to recover a strip of land 163.7 feet in width at the north end thereof and 111.2 feet in width at the south end, and about 324 feet in length, extending across the north half of lot 30, (except the north 256 feet thereof,) in Baxter's subdivision of the south section of the Ouilmette reservation, in township 42, north, range 13, east of the third principal meridian, in Cook county. A jury was waived, and the court, after hearing the evidence, found the defendants not guilty and rendered judgment against the plaintiff for costs. Littlejohn appealed to this court.

On June 26, 1886, Louesa Hill was the owner of the north half of said lot 30, except the north 256 feet thereof. On that date her husband, Benjamin Hill, executed and delivered to the Chicago, Evanston and Lake Superior Railway Company (hereinafter referred to as the railway company) the following agreement:

"In consideration of one dollar to me in hand paid by the Chicago, Evanston and Lake Superior Railway Company, the receipt whereof is hereby acknowledged, I, Ben-

jamin F. Hill, of Wilmette, Ill., hereby propose and agree to sell and convey to said railroad company, by a good and sufficient warranty deed, clear of all encumbrances, released of dower, and also to furnish a perfect abstract of title or certified copy thereof, the following real estate, situated in Cook county, State of Illinois, viz.: A strip of land one hundred and fifty (150) feet in width on the westerly side and one hundred feet in width on the easterly side of the line of said railway company's proposed right of way as surveyed and located through the north half (except the north 256 feet thereof) of lot twenty-nine (29) and the north half (except the north 256 feet thereof) of lot thirty (30), all in the subdivision of Baxter's share of Ouilmette reservation.

"Provided said railroad shall be constructed and in operation through the village of Wilmette within one year from date and said company shall locate and build a depot adjoining Hill street, in said village, at which all its suburban and local passenger trains shall stop.

"Deed to be delivered when road is built and in operation, but said company may enter upon said premises at once upon its acceptance of this proposition, for the purpose of constructing and operating its said railroad, at the price of one dollar to be paid to me by said company on the delivery of said deed. This proposition to be good and binding upon me, my heirs and assigns, if accepted by said company at any time within ninety days from date. Said real estate to be used by said company for its right of way and other railroad purposes in the construction and operation of its railroad," etc.

The railway company did not take possession of the strip in question until the fall of 1888. Before taking possession, an agent for the railway company asked Hill, in the presence of his wife, if the contract could be considered still in force, to which Hill replied in the affirmative. Soon after this conversation the railway company entered upon the land,

constructed a road-bed, laid tracks, and had trains in operation over this line on January 1, 1889. About a year later it constructed fences on each side of the strip in question, and built a depot on the north side of Hill street, just across the street from the strip of land in controversy, which is immediately south of Hill street and within the village of Wilmette. The railroad was not constructed through that village. It entered the village from the south-east and extended only a short distance north of the southern boundary line, and lacked about two miles of going through the village. Nothing further has been done by the railway company towards complying with the provision of the agreement requiring it to construct and operate a railroad through the village of Wilmette.

On August 1, 1890, Benjamin Hill and Louesa Hill, by warranty deed, conveyed to Edward A. Burge the north half of said lot 30, except the north 256 feet thereof. Immediately following the description the deed continues: "(This conveyance is made subject to the agreement for right of way to the Chicago, Evanston and Lake Superior Railway Company across the easterly end of said premises,) together with a reversionary right to the center of the streets around said premises and to the portion used by said railway in case of the vacation of said streets or either of them and in case the railway company should give up their right aforesaid." On the same day the above deed was executed, Burge, by warranty deed, conveyed to appellant, Littlejohn, the same premises. The language above quoted from the deed to Burge was also inserted in the deed to Littlejohn.

On June 4, 1903, Littlejohn made demand in writing upon the defendants for possession of the strip of land in question, and the demand not being complied with, on the 16th day of the same month he brought this suit.

Certain propositions of law were submitted to the superior court by the plaintiff, some of which were given and others refused. These propositions of law presented the

questions whether the plaintiff had proved title in himself and whether the defendants had shown any title or right to possession.

ARND & ARND, for appellant:

The words in the deed following the description of the property conveyed are no portion of the granting part of the deed. *Lockwood v. Mills*, 39 Ill. 602.

Deeds are construed most favorably to the grantee. In case of doubt or ambiguity a familiar canon of construction would require the deed to be construed most favorably to the grantee. *Alton v. Transportation Co.* 12 Ill. 38; *Price v. McConnell*, 27 id. 255; *Cottingham v. Parr*, 93 id. 233; *Sharp v. Thompson*, 100 id. 447.

If a deed contain two descriptions of land which do not coincide, the grantee is at liberty to elect that which is most favorable to him. *Railway Co. v. Tamplin*, 156 Ill. 285.

Exceptions and reservation should be construed most strictly against the grantor and most favorably to the grantee. 6 Am. & Eng. Ency. of Law, (2d ed.) 516.

An estoppel *in pais* cannot be invoked in an action of ejectment to defeat the legal title. *Blake v. Fash*, 44 Ill. 302; *Stock Yards v. Ferry Co.* 112 id. 384; *Railroad Co. v. Railroad Co.* 137 id. 9; *Wright v. Stice*, 173 id. 571; *Linnertz v. Dorway*, 175 id. 508; *Wakefield v. VanTassell*, 202 id. 41.

CHARLES B. KEELER, (GEORGE R. PECK, of counsel,) for appellees:

In ejectment plaintiff must recover upon the strength of his own title. If he cannot show legal title and right of possession in himself, he must fail as against a defendant in possession.

If defendants' right of way contract was forfeited by breach of any condition, the owner afterwards waived such forfeiture and ratified and confirmed defendants' possession

and rights by her deed of August 1, 1890, under which plaintiff claims. The language of her deed must be construed in the light of conditions then existing, of which plaintiff was bound to take notice. Conditions which go to defeat the contracts or deeds of parties are not favored in law, and courts will seize upon slight circumstances to prevent forfeitures. 3 Kerr on Real Prop. 1855, 1863, 1867; *Morgan v. Railway Co.* 96 U. S. 720.

Every part of a deed ought, if possible, to take effect and every word to operate. Effect must be given to each clause or term employed, and none should be rejected as meaningless. *Railway Co. v. Tamplin*, 156 Ill. 294.

Where the acts of the parties show that the condition upon which an agreement was to become void has been waived, the party in default will be excused from a compliance therewith, and the contract will be enforced as though it had contained no such condition. *Bock v. Slidell*, 1 La. Ann. 375; *Attix v. Pelan*, 5 Iowa, 336; 7 Am. & Eng. Ency. of Law, (2d ed.) 123.

In case of estates upon condition, the right to re-enter for a breach of such condition cannot be assigned. *Boone v. Clark*, 129 Ill. 502; *Nicoll v. Railway Co.* 12 N. Y. 121.

When the breach of a condition is once waived it is gone forever. 2 Washburn on Real Prop. 20; *Iron Co. v. Erie*, 41 Pa. St. 341; *Guild v. Richards*, 82 Mass. 326; *Andrews v. Lenter*, 32 Me. 397.

Where a railroad company is in possession under a right of way contract, although it has not strictly performed the conditions, yet if the owner accepts partial or incomplete performance and is satisfied therewith, the company may defend in ejectment as against a subsequent grantee of such owner who is charged with knowledge of the situation when he purchased. *Sands v. Wacaser*, 149 Ill. 530; *Turpin v. Railroad Co.* 105 id. 11; *Railroad Co. v. Hay*, 119 id. 493; *Sands v. Kagey*, 150 id. 114; *Railway Co. v. VanHoorebeke*, 191 id. 633.

Mr. JUSTICE SCOTT delivered the opinion of the court:

Treating the agreement signed by Benjamin Hill as binding upon his wife, Louesa Hill, by reason of her acquiescence therein, but without determining whether it is in fact binding upon her, the first question presented for our determination is whether the deed from Louesa Hill to Burge, and that from Burge to Littlejohn, conveyed the legal title to the strip in question to the latter.

The position taken by appellees seems to be that the railroad company had acquired title to the strip by taking possession under the agreement with Louesa Hill, made through her husband, and that the only interest which Louesa Hill had in that strip at the time she delivered the deed to Burge was a reversionary interest, or a possibility of reverter in case the railway company should thereafter abandon the strip as a right of way. We cannot agree with this contention. An agreement with a railroad company for the conveyance of a right of way stands on the same footing as any other contract for the conveyance of land. (*St. Louis and Belleville Electric Railway Co. v. VanHoorbeke*, 191 Ill. 633.) The railway company did not obtain any title whatever by virtue of the agreement with Louesa Hill, and by the terms thereof would not be entitled to a conveyance of title until it had performed certain conditions precedent. It was by the agreement given a license to enter upon the land to construct a road-bed and lay tracks and operate its trains while complying with the conditions. Such license, however, gave right to possession only, and not title. It is clear that the legal title to the strip of land in the possession of the railway company had not passed from Louesa Hill up to the time she delivered the deed to Burge.

Appellees contend, however, that by her deed to Burge, Louesa Hill recognized title to the right of way in the railway company and excepted such right of way from the grant to Burge. This contention is based upon that part of the deed which grants to Burge a reversionary right to the

portion of the premises used by the railway company in case the railway company should give up its right of way. The conveyance, however, is not made subject to the right of way, but only subject to the agreement for right of way. In order to except property included in the description of a deed from the operation of the grant, the intention so to do must be expressed in clear and certain terms. We do not think the language used in the deed following the description of the premises clearly indicates an intention on the part of the grantor to except the right of way from the operation of the deed, or recognizes title in the railway company. The purpose which Louesa Hill evidently had in mind in mentioning the reversionary right, after conveying property by a description which included the strip occupied by the railway company, was to pass title to the strip in case the railway company should comply with the provisions of the agreement for right of way, receive a deed therefor and afterwards abandon such right of way.

It follows that the legal title to the strip in question passed to Littlejohn by his deed from Burge.

The only remaining question is whether the defendants proved their possession to be rightful. Other than the rights claimed to have been reserved to them by the deeds above mentioned, they rely solely upon the agreement with Louesa Hill, through her husband, and the rights thereby conferred. The rights conferred by the agreement were, first, a license to enter upon the land for the purpose of constructing a road-bed, laying tracks and operating trains while performing the conditions contained in the agreement; and second, the right to a deed upon performing such conditions. The license was irrevocable only during the time specified in the agreement for complying with the conditions. After the termination of such period, if those conditions had not been performed the license was revocable at the will of the licensor or her grantee. (*Kamphouse v. Gaffner*, 73 Ill. 453.) It is conceded by appellees that the condition requiring the

railroad to be constructed and operated through the village of Wilmette has not been performed. There was a breach of all the conditions of the agreement before the railway company went into possession as it did not take possession within one year from the date of the contract, and at law Louesa Hill, or the owner of the legal title claiming through her, had a right to terminate the contract at any time thereafter before the conditions had been complied with, and to revoke the license under which the railway company was in possession. Littlejohn terminated the contract and revoked the license on June 4, 1903, by making demand in writing upon defendants for the possession of the land. After such demand the possession of the defendants ceased to be rightful under the contract with Louesa Hill.

Appellees rely upon *Sands v. Wacaser*, 149 Ill. 530, and similar cases decided by this court, as showing their possession to be rightful. It will be observed upon examination of those cases that the conditions, the performance of which would entitle the railroad company to a deed for the premises, had all been complied with before any attempt was made to declare a forfeiture of the contract, the only contention being that the conditions had not been performed within the time specified by the contract. In such case it is held that the owner of the land, having permitted the railroad company to enter upon the land and perform the conditions after the expiration of the time specified by the contract, has waived the right to declare a forfeiture of the contract on account of the conditions not having been performed within such time, and that a subsequent grantee can not be heard to complain of *laches* which his grantor had waived.

Here, however, the railway company not only failed to comply with the conditions within the time fixed by the contract, but it failed to perform one of the conditions at all, although nearly seventeen years have elapsed since making the agreement. We do not think the failure of Louesa Hill

to declare a forfeiture of the contract at the expiration of the time fixed for performance was a waiver of the right in herself or her grantee to insist upon a performance of the conditions at some future time or to declare a forfeiture for non-performance. This case is, therefore, plainly distinguishable from those cited by appellees.

Appellees also argue that the railway company is seized of an estate upon condition subsequent. The conditions were plainly conditions precedent. The railway company, by the terms of the agreement, could not demand a deed until it had performed all such conditions, and as no such deed was in fact delivered to it, it never became seized of any estate whatever which the law recognizes. The law in regard to estates upon condition subsequent, sought to be applied by appellees, has no bearing upon this case.

The plaintiff proved title in himself. The defendants failed to prove any title whatever or any right to the present possession of the strip of land occupied by them. The judgment of the superior court will therefore be reversed and the cause will be remanded to that court for further proceedings in conformity with the views herein expressed.

Reversed and remanded.

R. HALL McCORMICK, Trustee, *et al.*

v.

THE CHICAGO AND STATE LINE RAILWAY COMPANY.

Opinion filed February 21, 1906.

APPEALS AND ERRORS—*assignment of errors upon the record is essential.* An assignment of errors must be written upon or attached to the record itself, and it is not sufficient that an assignment of errors appears in the abstract of record alone.

APPEAL from the County Court of Lake county; the Hon. D. L. JONES, Judge, presiding.

A. K. STEARNS, and ELBRIDGE HANEY, for appellants.

CHARLES WHITNEY, and RALPH J. DADY, (S. A. LYNDE, of counsel,) for appellee.

Per CURIAM : This was a condemnation proceeding brought by appellee in the county court of Lake county to condemn certain property owned by appellants, for railroad purposes. The cause was tried before a jury, which, after hearing evidence and viewing the premises, returned a verdict for \$1075 for land taken and \$400 for the damages to property not taken. Judgment was entered on the verdict, and this appeal is prosecuted to reverse that judgment.

Various alleged errors are argued by appellants, but owing to the condition in which we find the record we cannot review the errors, for the reason that no errors are assigned of record. Appellee, in its brief filed November 16, 1905, and before the sitting of the court, called appellants' attention to the condition of the record, and insists that the errors argued shall not be considered because they are not assigned; but appellants have not seen fit to take advantage of such notice or contention by asking leave to make the necessary assignments of error, which could have been done upon motion, during the term and before the case was taken for consideration. The abstract shows assignments of error, but, of course, is not a true abstract of the record and is not sufficient, as an assignment of errors must be attached to the record itself and stands in the place of a declaration upon which judgment in this court is entered. *Metropolitan Life Ins. Co. v. People*, 205 Ill. 370.

The appeal is therefore dismissed.

Appeal dismissed.

FRANK KOMINSKI

v.

THE PEOPLE *ex rel.* Frances Alex.*Opinion filed February 21, 1906.*

APPEALS AND ERRORS—*assignment of errors is essential.* An appeal from the Appellate Court must be dismissed where nothing is shown in the abstract with reference to the proceedings in that court, and no assignment of errors is written upon or attached to the transcript of the record of that court.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Criminal Court of Cook county; the Hon. JESSE HOLDOM, Judge, presiding.

WILLIAM WALTER WITTY, for appellant.

W. H. STEAD, Attorney General, and JOHN J. HEALY, State's Attorney, for the People.

Per CURIAM: Appellant was tried upon a charge of bastardy in the criminal court of Cook county. Verdict was found against him and judgment entered thereon. He prosecuted a writ of error from the Appellate Court for the First District, where the judgment of the criminal court was affirmed, and he now appeals to this court.

Counsel for appellee point out by their brief and argument that no errors have been assigned upon the transcript of the record of the Appellate Court, and suggest that the appeal should be dismissed.

We find, on examination, that nothing whatever is shown by the abstract in reference to the proceedings in the Appellate Court, and that no assignment of error is in fact written upon or attached to the transcript of the record of that court. The appeal must therefore be dismissed. *Bennesson v. Savage*, 119 Ill. 135; *Ætna Life Ins. Co. v. Sanford*, 197 id. 310.

Appeal dismissed.

THOMAS W. RODHOUSE

v.

THE CHICAGO AND ALTON RAILWAY COMPANY.

Opinion filed February 21, 1906.

1. **CONTRACTS**—*what must be established by third party to recover damages for breach of contract.* A land owner in a drainage district, in order to recover damages for breach of a contract made by the defendant with the drainage commissioners of the district, which contract contains nothing to show that the plaintiff had any interest therein, must show that he had a special beneficial interest in the contract, or that the defendant owed him a duty different from that owing to the other land owners, the breach of which has caused him special damage.

2. **PLEADING**—*what does not show special interest or special duty.* An allegation in a declaration in assumpsit for damages for breach of a contract to which the plaintiff was not a party does not show a special interest in the contract in the plaintiff nor a special duty owing to him by the defendant, which avers that the contract was entered into for the benefit of the plaintiff and other owners and occupants of lands in a drainage district and for the purpose of protecting their lands from overflow.

3. **PARTIES**—*when plaintiff has no special interest in contract.* Mere ownership of land by the plaintiff in a drainage district does not entitle him to maintain a suit for breach of a contract to build a levee, entered into between the defendant and the commissioners of the district, to which contract the plaintiff was not a party, where it is not ascertained whether his land will be assessed for any benefits on account of the work to be performed under the contract, or for any part of the contract price for benefits accruing to the land from the performance of the contract.

WRIT OF ERROR to the Appellate Court for the Third District;—heard in that court on writ of error to the Circuit Court of Pike county; the Hon. HARRY HIGBEE, Judge, presiding.

This is an action in assumpsit, brought by the plaintiff in error against the defendant in error to the November term, 1904, of the circuit court of Pike county to recover damages for breach of a contract, made by the defendant in error with

the Board of Sny Island Levee Drainage District Commissioners, a corporation organized under the laws of Illinois, which contract is set out *in hac verba* in the amended declaration hereinafter mentioned. The original declaration was filed on November 3, 1904, to which a demurrer was sustained. Thereafter, by leave of court, an amended declaration was filed on December 9, 1904. A demurrer was filed to the amended declaration and sustained. Thereupon, plaintiff in error excepted, and stood by his amended declaration. Judgment was then rendered against plaintiff in error, the plaintiff below, in bar of the action, and for costs. A writ of error was sued out from the Appellate Court for the purpose of reviewing the judgment, so entered by the circuit court, which latter judgment has been affirmed by the Appellate Court. The present writ of error is sued out from this court for the purpose of reviewing the judgment of affirmance, so entered by the Appellate Court.

The amended declaration avers that, whereas on November 12, 1903, and for many years prior thereto, the Board of Sny Island Levee Drainage District Commissioners, a corporation, etc., were engaged in the construction, repair and maintenance of a levee along and near the shore of the Mississippi river, extending through the counties of Adams, Pike and Calhoun in said State of Illinois, for the purpose of protecting the land lying within said Sny Island levee drainage district from damage, caused by the waters from said Mississippi river, flowing over and upon said lands; that, on or about June 7, 1903, the waters from the said river broke through, washed away, and destroyed a portion of said Sny Island levee east of Quincy Junction in said county of Pike, upon the top of which said levee the defendant had constructed its railroad track, and over which it was then and there, and had been, for many years prior thereto, running and operating its railroad trains; that, thereafter, to-wit, on or about the 12th day of November, 1903, for the purpose of protecting Thomas W. Rodhouse, plaintiff herein, and

the other owners and occupants of lands in said Sny Island levee drainage district, from damage by overflow of water from said Mississippi river, and for the benefit of plaintiff, and the said owners and occupants of lands in said drainage district, the said defendant, the Chicago and Alton Railway Company entered into a contract with the said Board of Sny Island Levee Drainage District Commissioners in words and figures as follows, to-wit:

"This contract, made and entered into this 12th day of November, 1903, by and between the Chicago and Alton Railway Company, party of the first part and the Board of Sny Island Levee Drainage District Commissioners, party of the second part:

"Witnesseth, that the party of the first part hereby contracts and agrees, in consideration of the sum of \$25,000.00 to be paid by the party of the second part to the party of the first part, that it will, without further expense to the commissioners fill in the embankment of its main track east of Quincy Junction, and if possible complete the same in the year 1903, to the level of the tracks as they now exist, and if possible on or before the first day of June, 1904, to raise its main line and its river line, so as to make the top of the first party's embankment level with the top of the Sny levee as it now exists. And the said party of the first part will endeavor to make an arrangement with the Chicago, Burlington and Quincy Railroad Company, by which the embankment of the said Chicago, Burlington and Quincy Railroad Company from the end of the Chicago and Alton river track north to the existing levee of the party of the second part shall be raised to the same elevation on or before June 1, 1904. And the party of the first part also agrees at its own expense to strengthen its road-bed, when necessary to serve the purpose of this agreement, and all the work shall be done subject to the approval of the Board of Sny Island Levee Drainage District Commissioners. It is further agreed between the parties that this work shall be done under the supervision of

the party of the second part, and the Chicago and Alton Railway Company will assume no responsibility whatever for the maintenance of its embankment as a levee, the purpose of this contract being that the railroad company simply undertakes to bring its embankment to the height and strength above mentioned, that it may, in such condition, be used by the Board of Sny Island Levee Drainage District Commissioners as and for a levee embankment, but the railway company makes no undertaking that the same shall be sufficient, or that it will be strong enough or high enough to exclude water from the territory of the Board of Sny Island Levee Drainage District Commissioners, it being expressly understood that the Chicago and Alton Railway Company has no legal power to undertake to prepare a levee for the said commissioners, and it is not its intention to assume any responsibility in that direction. It is further contracted and agreed between the parties that the Board of Sny Island Levee Drainage District Commissioners shall have the privilege of policing the embankment so constructed by the party of the first part within the territory above referred to, and in case of high water or emergency or danger from the river, the said commissioners are authorized to enter upon the right of way and embankment of the Chicago and Alton Railway Company, and under the direction of the engineer of said railway company, do such work as in their judgment may be necessary to make the said embankment secure against such high water. The party of the first part further agrees to strengthen the break in its embankment immediately east of Pike Station, and it also agrees that the width of the embankment, after the track is raised, is to be its standard width on top, namely, eighteen feet, and is to be constructed with slopes sufficient to make a suitable embankment. And it is further agreed between the parties hereto, that said Board of Sny Island Levee Drainage District Commissioners will pay the Chicago and Alton Railway Company for the work aforesaid the sum of \$25,000.00, and will pay the first party

on or before the 15th day of each and every month, such proportion of said sum of \$25,000.00 as the total amount of work, done under this agreement by said first party in the previous month, bears to the total amount of all work provided herein to be done by the first party until the whole of said sum of \$25,000.00 is fully paid.

"In witness whereof the parties have hereunto set their hands and corporate seals this 12th day of November, 1903.

(Corporate Seal.)

THE CHICAGO AND ALTON RY. CO.,

By S. M. Felton, *Presl.*

BOARD OF SNY ISLAND LEVEE DRAIN-
AGE DISTRICT COMMISSIONERS,

(Corporate Seal.)

by H. B. Atkinson,

A. J. Thomas,

Harry Seehorn."

The declaration then alleges that said contract was duly presented to, and approved by the county court of the county of Pike, wherein the greater part of said Sny Island levee drainage district lies; that the defendant and its president and officers, at the time of entering into said contract, as aforesaid, well knew that the purpose of said contract as to the repair of said break in said Sny Island levee was for the purpose of protecting said Thomas W. Rodhouse, plaintiff herein, and other owners and occupants of lands in the said drainage district from damage by reason of overflow water from said Mississippi river; that said Rodhouse, plaintiff herein, is the owner and occupant, and has been such owner and occupant continuously since the date of the making of said contract, of the following described lands, to-wit: The north-east quarter of section 24, in township No. 7, south, range No. 4 west, in Pike county, Illinois, and that said lands are within the limits of said Sny Island levee drainage district; that said lands during the years 1903 and 1904 were in cultivation and used for general farm crops; that it was possible for the defendant, the Chicago and Alton Railway Company, to have complied with its said contract, and to have completed said embankment, and to have repaired said

levee in the year 1903, as agreed by it in said contract as aforesaid; that, if defendant had filled in the embankment of its main track east of Quincy Junction, and completed the same in the year 1903, to the level of its main track as it existed at the date of said contract, no overflow water from the Mississippi river would have flowed through said break in said levee in May, 1904, and no damage would have accrued to plaintiff by reason of such overflow, and that the Board of Sny Island Levee Drainage District Commissioners, parties of the second part in said contract, were at all times ready, willing and anxious to do and perform any and all acts and things, enjoined and required to be done and performed by it under and by the terms and provisions of said contract during said year 1903, and then and there notified defendant to perform the said contract upon their part, as therein enjoined and required; that defendant failed, refused and neglected to comply with its said contract to fill in said embankment, and that, by reason of said failure, refusal and neglect of the defendant to fill in its main track east of Quincy Junction, and to complete the same, or any part thereof, in the year 1903, to the level of the track as it existed at the date of said contract, and to complete the said embankment and repairs of said levee according to its said contract, as aforesaid, contracted to be made in 1903, or any part thereof, on or about the 5th day of May, 1904, the overflow waters from said Mississippi river flowed through said break in said Sny Island levee and overflowed said lands of the plaintiff herein in said Sny Island levee drainage district, and destroyed his crops thereon, of great value, to-wit, of the value of \$1500.00, and also did great damage to plaintiff's lands and improvements thereon, to-wit, to the amount of \$1000.00; to the damage of the plaintiff in the sum of \$2500.00, wherefore he brings suit, etc.

HAMILTON & HAMILTON, and WILLIAM MUMFORD, for plaintiff in error.

WINSTON, PAYNE & STRAWN, for defendant in error.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

The only question in this case is, whether or not the court below properly sustained the demurrer to the amended declaration. Upon this subject the Appellate Court, speaking through Mr. Justice BAUME, expressed the following views in their opinion, deciding this case:

"Plaintiff in error predicates his right of action in this case generally upon an application of the recognized rule, that a third party, for whose benefit a contract is made, may maintain an action in his own name for a breach thereof. (*Lawrence v. Oglesby*, 178 Ill. 122; *Webster v. Fleming*, 178 id. 140). And upon the authority of *Gage v. Springer*, 211 Ill. 200, it is claimed that plaintiff in error has such a beneficial interest in the performance of the contract alleged, as will authorize a recovery for damages accruing to him by its breach. The suit is in implied assumpsit upon the contract, and we must look to the terms of the contract to determine whether it creates such a privity of relation between plaintiff in error and defendant in error, as will authorize a suit by the former against the latter to recover damages for its breach. There is nothing in the contract, which, either directly or by necessary inference, identifies plaintiff in error as a party to be benefited by it. But if the direct beneficial interest of plaintiff in error could properly be established extraneously of the contract by appropriate averments in the declaration, such averments are wanting in the declaration here involved. The averment that the contract was entered into for the purpose of protecting plaintiff in error, and the other owners and occupants of lands in the district by damage from overflow, and for the benefit of plaintiff in error and the owners and occupants of lands in said district, does not invest plaintiff in error with a special beneficial interest in the performance of the contract, or establish that

defendant in error owed a duty to plaintiff in error other than that owing to all the owners of lands in the district. It was said in *Gage v. Springer, supra*: 'No private action will lie for damages of the same kind as those sustained by the general public, although the plaintiff may be damaged in a much greater degree than any other person.'

"It is, however, contended by plaintiff in error that he brings himself within the class, to whom defendant in error owed a special duty, under the holding in *Gage v. Springer, supra*, because the cost of the repair and maintenance of the levee is necessarily contributed by the owners of lands in the district according to the benefits accruing to each tract of land therein. The declaration contains the allegation, that plaintiff in error is the owner of certain described lands, and that said lands are within the limits of Sny Island levee drainage district, but it is not alleged that said lands have been, or will be, assessed for any benefits on account of the work to be performed by defendant in error under the contract declared on, or that plaintiff in error has been or will be called upon to pay any part of the contract price of \$25,000.00 for benefits accruing to his lands by the performance of the contract. Under the provisions of the Drainage act, it may or may not be ascertained and determined that the lands, alleged in the declaration to belong to plaintiff in error and to lie within the district, will be benefited by the work contemplated in the contract. If it has not been ascertained and determined that said lands will be benefited by the construction, repair and maintenance of the levee mentioned in the contract, plaintiff in error has no such special interest in its performance, as will authorize a suit by him to recover damages for its breach.

"For lack of privity of contract between the parties, and because it does not appear that defendant in error owed to plaintiff in error any special duty to perform the contract here involved, the demurrer to the declaration was properly sustained, and the judgment is affirmed."

We concur in the foregoing views expressed by the Appellate Court, and adopt the same as the opinion of this court in this case.

Accordingly, the judgment of the Appellate Court affirming the judgment of the circuit court, is affirmed.

Judgment affirmed.

E. E. HEIPLE *et al.*

v.

THE CITY OF WASHINGTON.

Opinion filed February 21, 1906.

1. SPECIAL TAXATION—*when section 7 of Local Improvement act, regarding first resolution, is complied with.* A resolution approving the engineer's estimate of cost and fixing the time and place for the public hearing as to the necessity, nature and cost of the improvement is sufficient compliance with section 7 of the Local Improvement act, though two motions were previously adopted by the board resolving to make the improvement and requiring the engineer to make an estimate.

2. SAME—*want of qualification of engineer does not invalidate special tax.* The statute does not specify the qualifications of the person acting as "public engineer," and the fact that the person who signed the estimate of the cost as "public engineer" was a farmer and lumber dealer does not invalidate the special tax, where he was requested to act by the board of local improvements, which approved his estimate, which estimate is not shown to be improper.

3. SAME—*fact that engineer was not properly a member of the improvement board cannot be shown.* That the engineer who made the estimate of cost was not properly a member of the improvement board cannot be shown upon application to confirm the tax, since the question of the legality of the organization of the board of local improvements can only be raised by *quo warranto*.

4. SAME—*fact that clerk's certificate is attached to face of the ordinance instead of back is not material.* The fact that the clerk's certificate is attached to the face of the improvement ordinance and refers to the "foregoing ordinance," instead of being attached to the back of the ordinance, is not material.

5. APPEALS AND ERRORS—*appellant should abstract record so as to fully show error relied upon.* It is the duty of parties insisting

upon errors to so abstract the record as to fully show the errors relied upon, and where the alleged error consists of the court's refusal to permit a certain question to be put to the jurors the abstract should show what other questions were asked.

APPEAL from the County Court of Tazewell county; the Hon. JESSE BLACK, Judge, presiding.

MAPLE & LOVETT, for appellants.

CHARLES A. WALTMIRE, and CHARLES V. MILES, for appellee.

Mr. JUSTICE WILKIN delivered the opinion of the court:

The appellee, the city of Washington, passed an ordinance for the paving of North Main street, in that city, by special taxation. A petition was filed in the county court of Tazewell county for the confirmation of the assessment. The appellants filed their objections on the question of benefits and also legal objections as to the sufficiency of the proceedings. All of the objections were overruled and judgment of confirmation entered. To reverse that judgment an appeal has been prosecuted to this court.

It is first insisted that section 7 of the Local Improvement act (Hurd's Stat. 1903, p. 392,) was not complied with, in that the first resolution of the board of local improvements did not fix a date and hour for the consideration of the improvement, and that the estimated cost of the improvement was not made a part of the record of the first resolution, but, on the contrary, that three resolutions were passed instead of one. This contention is not sustained by the record. On July 5, 1905, the board of local improvements held a meeting, at which a resolution was adopted which seems to be the basis or beginning of the improvement. It merely determined that the street should be paved. On the same day another resolution was passed calling upon the engineer to make an estimate of the cost of the proposed improvement and report the same to the board. After these two resolu-

tions had been adopted and after the engineer had made his report of the estimated cost, another resolution was adopted approving the report of the estimated cost as presented by the engineer and fixing the time and place for the hearing as to the necessity, nature and cost of the improvement. This last resolution contained all of the elements required by section 7 and was complete in itself. The other two resolutions were merely preliminary and were adopted for the purpose of making a record of the proceeding. They were, in fact, nothing more than motions made and carried by the board preliminary to complying with section 7.

It is next insisted that the notice of the public hearing did not inform the property owners that the extent of the improvement might be changed. This objection is based upon the fact that in the notice of the public hearing there was a typographical error, and the word "expense" was used instead of the word "extent." In other words, the notice read, "That the expense, [instead of extent] necessity for, nature, kind, character and estimated cost of such proposed improvement may be changed by this board at the public consideration thereof." It is the duty of the parties insisting on errors in this court to so abstract the record that it will fully show the error relied upon. This appellants have failed to do. They have merely abstracted such part of the record as they deemed necessary, and have omitted such other portions as they thought unnecessary to be presented. In the error complained of with reference to the notice of the public hearing only the two last divisions or paragraphs of the notice are abstracted. The notice consisted of twelve divisions or paragraphs, and we are left to infer what ten of them contained, and that none of them contained any reference to the possible change in the extent of the improvement. Notwithstanding this failure to properly present the error, we have made such an examination of the record as convinces us that no material mistake was committed and that appellants were in no way misled or injured in the respect complained of.

Complaint is next made that the engineer was not properly a member of the board of local improvements and as to the manner in which he signed the estimate of cost. It is claimed that he was a farmer and a lumber dealer, and not an engineer, and that he improperly signed the estimate as "city or public engineer." Section 3 of chapter 24 (Hurd's Stat. 1903, p. 391,) provides that in cities having a population of less than fifty thousand and in villages and incorporated towns, the city council or board of trustees may, in their discretion, provide by ordinance that the mayor or president shall appoint and designate a superintendent of streets and a public engineer, which offices may be discontinued by ordinance, etc. Section 6 of the same act provides that in cities having a population of less than fifty thousand and in villages and incorporated towns the board of local improvements shall consist of the mayor or president, who shall be president of such board, and the public engineer and the superintendent of streets, etc. There is nothing in this record to show that the engineer in question was not properly appointed and was not duly acting as such. Upon request of the board of local improvements he made an estimate of the cost of the improvement and his estimate was duly approved by the board. His act as a member of the board was in compliance with the statute. He was at least an officer *de facto*, and as far as this record shows also an officer *de jure*. The statute does not specify the qualifications to be possessed by the individual holding the office, and even if it did and the engineer in this case did not possess the qualifications required, that question could not be raised in the method attempted by appellant. In the case of *Betts v. City of Naperville*, 214 Ill. 380, we held that the question of the legality of the organization of the board of local improvements could not be raised upon application to confirm a special assessment, but must be raised by *quo warranto*. No question is raised as to the amount of the engineer's estimate or that it was not properly and correctly made, and

even though he placed an improper title after his name that would not constitute reversible error, especially where the appellants are not shown to have been injured thereby.

It is next objected that the ordinance for the improvement was not properly certified by the city clerk, because his certificate preceded, instead of followed, the ordinance and referred to it as "the foregoing" ordinance. An examination of the abstract of record shows that the clerk, in his certificate, used the following language: "Do hereby certify that the above and foregoing ordinance, marked 'Exhibit B,' " etc. The language of the statute is: "There shall be attached to or filed with such petition a copy of said ordinance, certified by the clerk under the corporate seal." The ordinance was properly certified under the corporate seal, and the only error was that the certificate was attached to the face instead of on the back of the ordinance. The statute does not say where or how the certificate shall be attached, but merely that there shall be attached to or filed with such petition a copy of the ordinance, certified by the clerk under the corporate seal. There was but one ordinance. It was marked "Exhibit B." There was but one "Exhibit B," and therefore there could be no possible mistake as to the identity of the ordinance to which the clerk certified.

Objection is next made to the refusal of the trial court to permit certain questions to be asked of jurors concerning the burden of proof they would require before rendering their verdict. The abstract of record does not contain all of the questions asked the jurors, but merely contains the one question to which objection is made. The question objected to might have been properly covered by other questions asked, and therefore we cannot say that the refusal was injurious.

Many of the objections raised are exceedingly technical, and none of them, in our opinion, well taken.

The judgment of the county court will be affirmed.

Judgment affirmed.

CHARLES A. MASON

v.

WILLIAM H. MASON *et al.**Opinion filed February 21, 1906.*

1. PLEADING—*conclusions of law are not admitted by demurrer.* A demurrer to a bill for partition does not admit the legal conclusion of the complainant that he is a tenant in common with the defendants, where the facts alleged in the bill do not sustain such conclusion.

2. TRUSTS—*when trust is active.* Where the trustee holds the legal title for the benefit of the *cestui que trust* for life, with power to sell the land and loan or re-invest the proceeds and pay over the income to the *cestui que trust* at such times as the trustee may deem best, the trust is an active one and is not executed by the Statute of Uses.

3. SAME—*when deed by trustee cannot be set aside.* A deed by a trustee having power and authority to make the same cannot be set aside at the suit of the *cestui que trust*, in the absence of any allegation in the bill of fraud or collusion or that the property was not sold for its full value.

4. PARTITION—*what interest in land will not justify partition.* One entitled to the income for life from an undivided one-third of land held in trust for him by a trustee, who has power to sell such one-third interest at his discretion and loan or invest the proceeds and pay the income to the *cestui que trust*, has no such interest as authorizes him to maintain a bill to partition the land.

APPEAL from the Circuit Court of McLean county; the Hon. COLOSTIN D. MYERS, Judge, presiding.

Appellant, Charles A. Mason, filed a bill in the circuit court of McLean county for partition of 240 acres of land, claiming an undivided one-third in the whole of said premises. The bill as filed was demurred to and the demurrer was sustained by the chancellor and a decree entered accordingly, from which decree this appeal is prosecuted to this court.

The bill sets up a will and two codicils thereto attached, which were probated in said county; also two deeds subse-

quent to the will, both made on the same day, one conveying the undivided one-third of the property in question to William H. Mason in trust for the complainant, and the other conveying an undivided two-thirds to the complainant's two brothers, Samuel B. and William H. Mason, in fee. The allegations of the bill, or so much of the same as will be necessary to be considered by this court, are, in substance, as follows:

"Your orator, Charles A. Mason, of, etc., respectfully represents that Solomon Mason, the father of your orator, now deceased, was at the time of his last will and testament, and also at the time of his death, seized in fee simple and possessed of all the following described real estate (describing the same); that on August 14, 1879, Solomon Mason made and published his last will and testament in due form, etc.; that on July 28, 1880, he made a codicil to said will, and September 29, 1880, added a second codicil." The bill then sets out the whole will at length, a part of which is as follows: "In case I survive my said wife, I give and bequeath unto my sons Samuel B. Mason, William H. Mason and Charles A. Mason all of my personal estate of every nature whatever, after the payment of all my just debts, funeral and other necessary expenses." The first codicil, as set out, is as follows:

"I, Solomon Mason, of the town of Downs, in the county of McLean and State of Illinois, do hereby make this codicil to be taken as a part of my last will and testament, as follows: That is to say, whereas by the dispensation of Providence my wife, Elizabeth Mason, departed this life on the 15th day of February, in the year of our Lord 1880; and whereas, I had expected that my then youngest children would have the care of my wife after my death, and in consideration thereof I have provided in my will a compensation therefor, and by reason of her death I do now give and bequeath to my sons George Mason, John W. Mason and Daniel W. Mason the sum of \$350 each, and to my daughters,

Eliza M. French, Mary Miller and Sarah M. Horine, the sum of \$350 each, and to the heirs of Amos Mason, deceased, the sum of \$350, to be divided equally between said children. These several sums are in addition to the bequest provided for them by the will. These several sums to be paid by my executor out of my estate. I here revoke and make void all that part of my said will making provision for my said wife, and I now devise and give the same property to my three youngest sons, Samuel B. Mason, William H. Mason and Charles A. Mason; and I hereby modify my said will in this, that the estate and title given by the will and this codicil to my son Charles A. Mason shall be vested on my death in my son William H. Mason for the use and benefit of my said son Charles A. Mason, that is to say, that I hereby appoint my son William H. Mason trustee to hold said property in trust for the use of my said son Charles A. Mason, and vest in him the title to said estate so given to my son Charles A. Mason, the said trustee to pay to the said Charles A. Mason the rents, profits and income from the same at such time or times as the prudence and judgment of the trustee and the advice of my son Samuel B. Mason may deem right and proper. I further desire that in case my said son Charles A. Mason may have children born unto him, that said estate on the death of the said Charles A. Mason shall vest in said children and that same be turned over to them, or if minors, to their lawful guardian or guardians, and the same to vest in said children absolutely, and in case of the death of my said son Charles A. Mason without issue, that the said trustee, out of said estate so held by him in trust, pay to the trustees of Westfield College, located in Clark county, in the State of Illinois, for the use and benefit of said college, the sum of \$500, and that the residue of said estate be divided equally between my two sons Samuel B. Mason and William H. Mason. I further desire that said trustee shall not be required to give bonds unless the said estate shall be in danger of loss."

The second codicil which was made by the testator is as follows:

"I, Solomon Mason, of the town of Downs, in the county of McLean and State of Illinois, do hereby make this second codicil, to be taken as a part of my last will and testament, and the codicil heretofore made, that is to say, that I hereby authorize my said son William H. Mason, trustee of Charles A. Mason, to sell and dispose of any and all property devised to the said Charles A. Mason at any time said trustee shall deem the sale of the same, or any part thereof, advisable, and to re-invest or loan the proceeds of such sale, or sell, as he may deem for the best interests of said Charles A. Mason."

The bill further alleges that on June 21, 1881, Solomon Mason and Samuel and William Mason made and executed three certain contemporaneous agreements which were filed for record in said county, the first being:

"This indenture witnesseth, that the grantor, Solomon Mason, of the town of Downs, county of McLean and State of Illinois, for and in consideration of the sum of \$50 in hand paid, convey and warrant to William H. Mason, of the county of McLean, the following described real estate, to-wit: The undivided one-third of the west half of the south-east quarter of section seven (7), and the west half of the north-east quarter and the east half of the north-west quarter of section eighteen (18), in township twenty-two (22), north of range 3, east of the third principal meridian, in trust for Charles A. Mason, to pay to him, the said Charles A. Mason, the net income from the same over and above repairs and taxes, with full power to the said William H. Mason to sell said lands and either loan the money or invest the same in other lands. This deed is made subject to a life lease this day made by the said party of the second part to the said party of the first part, situated in the county of McLean, in the State of Illinois, hereby releasing and waiving all rights under and by virtue of the homestead exemption laws of this State."

The second agreement is as follows:

"This indenture, made and entered into this 21st day of June, 1881, by and between Samuel B. Mason and William H. Mason, of the county of McLean and State of Illinois, parties of the first part, and Solomon Mason, of the same county, party of the second part, witnesseth the agreement as follows, that is to say, the said party of the second part has this day conveyed to the said party of the first the west half of the south-east quarter of section seven (7), and the west half of the north-east quarter and the east half of the north-west quarter of section eighteen (18), in township twenty-two (22), north, range 3, east, situated in the county of McLean and State of Illinois. And in consideration of the said conveyances which are hereby referred to and made a part thereof, it is agreed that the said Solomon Mason is to retain the use and occupation of said land, as heretofore, during his natural life, with the right to the said party of the first part to make any and all necessary improvements thereon. It is further agreed that this instrument is to be taken and considered as being the said Solomon Mason a life estate in and to the said lands, and the deed this day made by him is to be construed with reference to this lease. This instrument is made subject to my last will and the codicil thereto attached."

The bill further avers that on March 22, 1892, Samuel B. Mason and wife and William H. Mason and wife, and William H. Mason as trustee of Charles A. Mason, executed a deed of conveyance to Eli Maxwell for 40 acres of the property in question, and on November 1, 1893, William H. Mason and wife conveyed to Samuel B. Mason the undivided one-third interest of 160 acres; and further avers that William H. Mason on the same date, as trustee of Charles A. Mason, executed a deed to Samuel B. Mason for an undivided one-third interest of the same 160 acres; that on February 28, 1895, Eli Maxwell conveyed the 40 he purchased to Emery Armstrong and Thomas Armstrong; that on July 13, 1902, William H. Mason and wife, by two deeds, one as

trustee and the other for said Mason's own interest, conveyed to Samuel B. Mason the other 40 acres, and alleges that the real estate so conveyed was all the property owned in common by the parties to the suit; further shows that Elizabeth Mason died on February 15, 1880; prays that the deeds of Samuel B. and William H. Mason, as trustee, to Maxwell be declared null and void and be set aside, and that the deeds to William H. Mason in person and as trustee to Samuel B. Mason be declared null and void and set aside, and that a partition of the premises be made among the several parties according to their rights and interest.

S. P. ROBINSON, and D. D. DONAHUE, for appellant.

BARRY & MORRISSEY, for appellees.

Mr. JUSTICE RICKS delivered the opinion of the court:

It will be seen from the above statement of facts that Charles A. Mason claims title to the undivided one-third interest of said land by reason of the will and codicils of his father or by the deed executed by his father to his brother, William H., in trust. In the view we take we deem it unnecessary to discuss the question as to which of the instruments he obtained any interest in the property under, as in neither event would he have such an interest as would give him a right of partition.

Section 1 of the Partition act provides: "That when land, tenements or hereditaments are held in joint tenancy, tenancy in common or coparcenary, whether such right or title is derived by purchase, devise or descent, or whether any or all of the claimants are minors or of full age, any one or more of the persons interested therein may compel a partition thereof by bill in chancery," etc.

Appellant contends that he is tenant in common with his two brothers, and so alleged in the bill; but the averment in his bill is a conclusion of law reached by the pleader and is not borne out by the allegations of fact alleged in the bill.

Conclusions of law set out in a bill by the pleader are not admitted on demurrer, as facts as alleged in the bill, and not conclusions of law, are what govern in determining whether or not a bill is good on demurrer. Legal conclusions may be treated as surplusage. (12 Ency. of Pl. & Pr. 1028.)

The facts as recited in the bill do not show that appellant is interested in the property in question as a tenant in common or as a joint tenant. By neither the will of his father as modified by the codicils, nor by the trust deed from his father, Solomon Mason, to his brother William H. Mason, does appellant take any legal estate in the land described in the bill. By the will and codicils it is to be held by the trustee during the life of complainant, with power in the trustee to sell and convert the same and re-invest the fund and to pay to complainant the rents, profits and incomes from the same, at such time and times as the prudence and the judgment of the trustee and the advice of Samuel B. Mason (another brother of complainant) may deem right and proper, and upon the death of complainant leaving children him surviving, the fee or *corpus* is to go to them, and in default thereof, for other purposes designated in the will. By the trust deed the trustee is vested with the legal estate, with power to sell the land and either loan the money or invest the same in other lands, and to pay the net income from the same, above repairs and taxes, to appellant. The trusts imposed by both the will and the trust deed are active trusts, and not such as are executed by the Statute of Uses. Nor does appellant allege in his bill that there was fraud or collusion between his brothers, or that the property did not sell for its full value, which averments would be necessary in a bill to set aside the deeds, before the court would be warranted in setting them aside, if such was the prayer. (*Dickson v. New York Biscuit Co.* 211 Ill. 468.) Besides, if the deeds were to be held to be null and void, still appellant would not have such an interest, as shown by the facts in the bill, as would give him the right of partition. He would be left in the same position as he was

at his father's death, with the title to the property in William H. instead of in Samuel B., as it now stands, as there is no allegation in the bill nor a prayer asking that either the deed from his father to William H. in trust be declared null and void, or that the will and codicils be declared null and void or set aside or that the trustee be removed. It is true that there is an averment that the property was owned in fee simple by Solomon Mason, the father, at the time of his death; but as above said, this is simply a conclusion of the pleader and is not borne out by the facts as alleged in the bill.

Under this condition of the record the chancellor could not do otherwise than sustain the demurrer, and the decree of the circuit court is accordingly affirmed.

Decree affirmed.

J. G. MCCARTHY

v.

THE ALPHONS CUSTODIS CHIMNEY CONSTRUCTION CO.

Opinion filed February 21, 1906.

1. BONDS—*affirmance of judgment appealed from is conclusive of validity of judgment in action on appeal bond.* An affirmance by a court of review of the judgment appealed from is conclusive of the validity of the judgment in an action on the appeal bond.

2. SAME—*what not a defense to suit on appeal bond.* The fact that the plaintiff in an action on an appeal bond was, *at the time the bond was executed*, a foreign corporation which had not complied with the laws of Illinois, is not a defense to the action, upon the theory that the judgment appealed from was void for that reason and that the appeal bond was consequently void.

3. SAME—*obligor and sureties are estopped to set up defenses contradicting recitals of bond.* The obligor and sureties are alike estopped, when sued upon an appeal bond, to set up defenses which contradict the recitals of the bond, and where the bond recites the existence of the judgment the obligor and sureties are estopped to deny the existence of the judgment or that it was valid.

4. APPEALS AND ERRORS—*when Appellate Court's allowance of damages for prosecuting appeal for delay will stand.* The action

of the Appellate Court in allowing damages upon the ground that the appeal was prosecuted merely for delay will not be interfered with by the Supreme Court in the absence of any showing that the Appellate Court abused its discretion in that respect.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JESSE HOLDOM, Judge, presiding.

This is an action of debt, brought on January 13, 1904, in the superior court of Cook county by the appellee against the appellant, as surety upon an appeal bond. Three pleas were filed, to which the appellee, plaintiff below, demurred. The demurrers were sustained, to which appellant took exception, and elected to stand by his pleas, and thereupon the court rendered judgment in favor of appellee against the appellant in the sum of \$6500.00 debt, and assessed appellee's damages at the sum of \$4706.25, together with costs, and ordered that execution issue therefor, and that the debt be discharged on payment of the damages, interest and costs of suit, to which the appellant excepted. An appeal was taken from the judgment so entered to the Appellate Court, and the Appellate Court has affirmed the judgment of the superior court of Cook county. The present appeal is prosecuted from such judgment of affirmance.

The declaration alleges that L. L. Leach & Son, a corporation, as principal, and appellant, as surety, on February 10, 1902, in Chicago, by their writing obligatory of that date, jointly and severally acknowledged themselves bound unto appellee in the sum of \$6500.00 to be paid it, subject to a certain condition, whereby, after reciting to the effect that at the February term, 1902, of said superior court, by the consideration of that court, the appellee as plaintiff recovered against the said L. L. Leach & Son a judgment for \$4258.25, besides costs of suit, from which judgment said L. L. Leach & Son prayed for and obtained an appeal to the Appellate Court for the First District; it was provided that

if it, the said L. L. Leach & Son, should duly prosecute its said appeal with effect, and pay the plaintiff the amount of said judgment, costs, interest and damages, rendered and to be rendered against it, said L. L. Leach & Son, in case said judgment should be affirmed in the Appellate Court, then said writing obligatory was to be void, otherwise to remain in full force, as by the writing obligatory remaining on file in said superior court would fully appear. The declaration then avers that, though afterwards at the October term, 1903, of the Appellate Court, to-wit, on the 12th day of November, 1903, by the consideration of said Appellate Court, said judgment in said writing obligatory mentioned was affirmed, yet said L. L. Leach & Son has not paid appellee the amount of said judgment, and costs, in said writing obligatory mentioned, nor the interest thereon nor any part thereof, whereby an action has accrued to appellee, as plaintiff, to demand of appellant as defendant said sum of \$6500.00, etc.

By the pleas, which were demurred to, the appellant, as defendant below, set up that appellee was a foreign corporation, incorporated under the laws of New Jersey, and not under the laws of Illinois; that, before and at the time of the execution of the writing obligatory mentioned in the declaration, to-wit, on February 10, 1902, appellee had been and was engaged in transacting business in Illinois through its local agent at Chicago; that, at the time of the execution of said writing obligatory on February 10, 1902, appellee had not filed in the office of the Secretary of State a copy of its charter or articles of incorporation, or other certificate of incorporation, duly certified and authenticated, etc.; that appellee, as such foreign corporation, by its president or other officer, had not made and forwarded to the Secretary of State, with its articles of incorporation, a statement duly sworn to of the proportion of the capital stock of said corporation, represented in the State of Illinois by its property located and business transacted therein, together with a

statement showing the name and address of the agent or representative of it in Illinois; and that appellee had not at said time, or prior thereto, paid into the office of the Secretary of State fees, equal to those required of similar corporations formed within and under the laws of the State of Illinois in proportion to its capital stock, represented by its property and business; that it was the duty of appellee to do and perform these matters and things in pursuance of the provisions of the statute of Illinois, then and still in force, and entitled, "An act to amend an act entitled, 'An act to require every foreign corporation doing business in this State to have a public office or place in this State at which to transact its business, subjecting it to a certain condition, and requiring it to file its articles or charter of incorporation with the Secretary of State, and to pay certain taxes and fees thereon,' approved May 26, 1897, in force July 1, 1897," approved April 22, 1899, in force July 1, 1899, before appellee was entitled to transact business in Illinois or maintain any suit or action upon any demand, whether arising out of contract or tort; that, by virtue of said statute, appellee was required, before it was entitled or authorized to transact business in Illinois, or to bring or maintain any action or suit whatsoever in the courts of the State, to further apply for and receive from the Secretary of State a certificate, authorizing it to do business in Illinois, and that, at the time of the execution of said alleged writing obligatory in the declaration mentioned, and wherein it, the appellee, is the obligee, the appellee had not applied for or received from the Secretary of State any certificate whatsoever, authorizing it to do business in Illinois, pursuant to the provisions of said act; that the business of appellee is that of constructing or building chimneys; that, before and on said 10th day of February, 1902, it was engaged in conducting and carrying on its business through its local agent or representative in Illinois at Chicago, and had been so engaged for a long time, to-wit, for the period of three years prior there-

to; that the alleged writing obligatory was made and entered into with appellee, as plaintiff in the certain suit then pending in the superior court of said county, wherein L. L. Leach & Son, a corporation, was defendant, on to-wit February 10, 1902, at which time and while appellee was by the terms and provisions of said act wholly without right or authority to have or maintain said suit wherein it was plaintiff as aforesaid, and was by means of the premises wholly prohibited and debarred therefrom, and so the appellant, as defendant, says that the said writing obligatory was and is wholly void and contrary to the said statute in such case made and provided.

The first of the three pleas, which were demurred to, avers that the judgment in the declaration mentioned, as well as the writing obligatory, was and is wholly void, and of no effect.

JOHN E. DALTON, and JOHN S. STEVENS, for appellant.

ZEISLER, FARSON & FRIEDMAN, for appellee.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

The pleas, to which demurrers were sustained, allege that, at and up to the time of the execution of the appeal bond sued upon, the appellee, although a foreign corporation and doing business in Illinois, had not complied with the requirements of the statute of Illinois, which are essential to its right to transact business in Illinois, or maintain actions in Illinois courts; and, for this reason, the pleas allege that the judgment, in the appeal bond recited, and the appeal bond itself are null and void.

It is recited in the declaration and in the bond that on February 10, 1902, appellee obtained in the superior court of Cook county a judgment against L. L. Leach & Son for \$4258.25, besides costs of suit, from which judgment L. L.

Leach & Son prayed for and obtained an appeal to the Appellate Court. It is averred in the declaration that, on November 12, 1903, this judgment was affirmed by the Appellate Court. In view of these allegations, the pleas demurred to set up no valid defense. The defense was, that the appellee, being a foreign corporation, had not complied with such requirements of the statutes of this State, as authorized it to do business in this State, and to bring or maintain actions in the courts of this State.

The suit at bar, being an action upon the appeal bond, is a collateral proceeding, so far as the original judgment of appellee against L. L. Leach & Son is concerned. It does not appear whether or not the defense, here sought to be set up to this action upon the appeal bond, was actually set up in the original suit, brought by appellee against L. L. Leach & Son. The defense of non-compliance with the statute in question may have been raised in the main suit, so far as the present record shows. If it was so raised, the judgment in that case is an adjudication against such defense. If it was not so raised in the original suit, it is too late to raise it in the present action, and in this court. In *Holmes v. Standard Oil Co.* 183 Ill. 70, it was said: "Whether the appellee company had failed to comply with the requirements of the act relating to foreign corporations, approved May 26, 1897, * * * and for that reason was without standing to maintain an action in the courts of this State, was not raised at the hearing. It does not appear any ruling was sought or obtained in the trial court as to the question. There is, therefore, nothing upon which to base an assignment of error in that regard in a court of review."

The declaration in the case at bar shows upon its face that the judgment, mentioned in the appeal bond, from which an appeal was taken to the Appellate Court, was affirmed by the Appellate Court. Such judgment of affirmance by the Appellate Court is conclusive as to the validity of the judgment, from which the appeal was taken to the Appellate

Court. In *Keithsburg and Eastern Railroad Co. v. Henry*, 90 Ill. 255, the action was on an appeal bond in the penal sum of \$2500.00, and was subject to a condition thereunder written, in which it was recited that the appellee therein recovered a judgment against the Keithsburg and Eastern Railroad Company, from which judgment the company had taken an appeal to the Supreme Court, and that, if the company should prosecute its appeal with effect, and should pay the judgment, costs, interest and damages in case the judgment was affirmed, then the bond should be void, otherwise to remain in full force and effect; and we there said: "It is proved the judgment was afterwards affirmed in the Supreme Court. * * * The judgment of the Supreme Court is conclusive as to the validity of the judgment appealed from, and no inquiry can be had in this collateral proceeding as to the merits of the original controversy, nor even as to the validity of the judgment itself."

The recitals of the bond sued upon are conclusive as to the validity of the judgment, mentioned in the bond. In *Smith v. Whitaker*, 11 Ill. 417, which was an action in debt upon an appeal bond, and where the third plea filed was "that there is not any record of the said supposed judgment, rendered by the said justice, remaining on the docket of the said justice in his court, in manner and form as recited in the condition of the said writing obligatory;" it was there said by this court: "Was the demurrer properly sustained to the third plea? The plea alleges, in substance, that there was no such judgment before the justice, as is recited in the condition of the bond sued on. The defendant was estopped by the record from making such an allegation. The bond is set out in the declaration, and it distinctly states that a judgment had been rendered by the justice. The very object of the parties in executing the bond was to prevent the collection of the judgment, and have the case re-heard in the circuit court; and the bond was expressly conditioned for the payment of the judgment, in the event it should be affirmed.

It was, therefore, a solemn admission by the defendant that there was such a judgment. He voluntarily entered into an engagement under his hand and seal for the payment of the judgment; and he could not afterwards deny what he thus deliberately asserted to be true—the existence of the judgment. The principle of estoppel is clearly applicable. The fact, which concluded the defendant from making the denial, appeared on the face of the declaration; and the estoppel was rightly insisted on by demurrer. Where the matter, which operates as an estoppel, appears in the declaration, the plaintiff may demur to a plea, by which the defendant attempts to set up the same matter as a defense. But, if the matter of estoppel does not appear on the face of the declaration, the plaintiff must, by a replication to the plea, expressly show such matter, and rely thereon.”

In *Harding v. Kuessner*, 172 Ill. 125, it was said: “It is familiar law the obligors in an appeal bond are estopped to deny the recitals of the bond.” (See also *Arnott v. Friel*, 50 Ill. 174; *George v. Bischoff*, 68 id. 236; *Herrick v. Swartwout*, 72 id. 340).

So, in the case at bar, the appeal bond recites the existence of the judgment, and appellant is estopped from denying that there was such a judgment, or that it was void. The appellant here, as surety, voluntarily signed the engagement under his hand and seal for the payment of the judgment, and could not, therefore, deny the existence of the judgment, which he admitted by so signing the bond. This matter of estoppel appears upon the face of the declaration, so that the question is raised by appellee’s demurrers to the pleas, by which appellant has attempted to set up the same matter as a defense.

The bond was executed in order to enable the parties, who signed it, to take an appeal from the judgment to the Appellate Court. The bond recites that the appeal had been prayed for and obtained, and provides that the bond is void in case the appeal is prosecuted with effect. Hence, the ap-

pellant in this suit upon the bond cannot be heard to say that no appeal was ever taken; nor can he be permitted to question the truth of the recitals in the bond. The bond in question is a voluntary contract. The expenses incurred by appellee in defending the appeal on the faith of the bond are a sufficient consideration for entering into it. (*Meserve v. Clark*, 115 Ill. 580; *George v. Bischoff*, *supra*).

It is true that appellant is a mere surety upon the bond; but "in an action on an appeal bond the obligors and sureties are estopped from setting up defenses that contradict the recitals therein." (24 Am. & Eng. Ency. of Law,—2d ed.—p. 67; *Arnott v. Friel*, *supra*; *Shaw v. Havekluft*, 21 Ill. 127).

Not only is it true that *nul tiel record* is a bad plea to an action upon an appeal bond under the authorities above referred to, so that the validity of the judgment, recited in the bond, cannot here be open to question, but the execution of the bond here sued upon cannot be said to be the act of the appellee. The bond was voluntarily executed by L. L. Leach & Son, as principal, and appellant, as surety. When executed the bond was filed in court. L. L. Leach & Son were not bound to take an appeal, nor was appellant compelled to sign the bond as surety. Appellee's consent to the execution of the bond was not required, so that the giving of the bond was not in any sense the act of appellee. If the bond had not been given, appellee could have had execution under its judgment, but, by reason of the giving of the bond, was compelled to follow the case to the Appellate Court. This action was involuntary on the part of appellee. It cannot be said, therefore, that the execution and filing of this appeal bond by L. L. Leach & Son and the appellant constituted a "transaction of business" on the part of the appellee. It is to be noted that the pleas do not allege, that, up to the time of instituting the suit upon the appeal bond, appellee had failed to comply with the requirements of the statute, but the pleas allege such non-compliance with the statute at and

up to the time of the execution of the appeal bond sued upon. The question is not whether, at the time when the appeal bond was executed, the appellee was a duly licensed foreign corporation, but the only question, which can be raised in this case, is whether, at the time of beginning this suit on the appeal bond, appellee was a duly licensed foreign corporation. There is no allegation in the pleas that, at the time of beginning the suit on the appeal bond, appellee had not complied with the requirements of the statute, but only that at the time of the execution of the bond it had not so complied. Its rights are to be determined as of the date of the beginning of the suit. (*Thompson Co. v. Whitehed*, 185 Ill. 454). For the reasons above stated, we are of the opinion that the demurrers to the pleas were properly sustained by the trial court, and, inasmuch as appellant stood by his pleas, that the judgment of the court was correct.

In the case at bar, upon the appeal to the Appellate Court, the Appellate Court in its judgment has not only affirmed the judgment of the superior court of Cook county, but it has also ordered "that appellee recover of and from appellant the sum of \$212.91 for its damages upon the amount of said judgment, and its costs to be taxed, and have execution therefor." Upon this subject the Appellate Court say in their opinion: "The court is of the opinion that the inference is warranted from the record that this appeal was prosecuted for delay, and therefore affirms the judgment with additional damages \$212.91, (being five per cent of the damages assessed below), in addition to the costs." Complaint is made by appellant of this action of the Appellate Court in thus allowing damages. In *Baker v. Prebis*, 185 Ill. 191, we held that, under section 23 of the act on costs, when read in connection with section 10 of the Appellate Court act, the Appellate Court may assess damages against a party who has prosecuted an appeal or writ of error merely for delay; and that this court will not review the exercise of the Appellate Court's discretionary power in assessing damages for

prosecuting an appeal for delay, in the absence of any showing that such power has been abused. There is no evidence here of any abuse of such power.

Accordingly, the judgment of the Appellate Court, including the allowance of damages, is affirmed.

Judgment affirmed.

FRANK KLAWITER

v.

JOHN H. JONES.

Opinion filed February 21, 1906.

1. PLEADING—*negligence charged against one joint defendant cannot be imputed to the other.* In determining whether a declaration against a corporation and its foreman, as joint defendants, states a cause of action against the foreman, allegations charging negligence against the corporation alone cannot be considered.

2. SAME—*when declaration does not allege a cause of action against master's foreman.* A declaration in a personal injury case against a corporation and its foreman, alleging that the plaintiff was employed by the corporation and was under the orders of the foreman; that it was the duty of the defendants to see to it that nothing was done to unnecessarily expose the plaintiff to danger, but that in disregard of such duty the corporation, by its foreman, negligently ordered the plaintiff to assist in removing a scaffolding, "for which purpose an insufficient number of men had been provided," whereby plaintiff, while using due care, was injured, does not state a cause of action against the foreman.

WRIT OF ERROR to the Branch Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. A. H. CHETLAIN, Judge, presiding.

DOUTHART & BRENDCKE, for plaintiff in error.

HENRY B. BALE, and COX, HELDMAN & EVERETT, for defendant in error.

Mr. JUSTICE SCOTT delivered the opinion of the court:

The original declaration in this case consisted of one count, and was filed in the superior court of Cook county on May 19, 1896, by Frank Klawiter, the plaintiff in error, against John H. Jones, who is the defendant in error, and the Illinois Steel Company. It is set out in the abstract, as follows:

"This declaration avers that on November 13, 1895, plaintiff was in the employ of defendants in a certain yard adjacent to a certain establishment commonly called a rolling mill, owned, controlled and operated by defendant Illinois Steel Company; that plaintiff, as a common laborer, while employed as aforesaid, was then and there under the orders and subject to the directions of a certain foreman or boss or superintendent of defendant Illinois Steel Company, whose directions plaintiff was obliged and required to obey; that while so engaged it was the duty of defendants to have seen to it that nothing should be done which would unnecessarily expose plaintiff to danger; that defendants, in utter disregard of duties in this behalf, did not see to it that nothing was done which would expose plaintiff to danger, nor did they exercise reasonable care for the safety of plaintiff, inasmuch as it, the said defendant Illinois Steel Company, by its said foreman, boss or superintendent, then negligently ordered plaintiff to help and assist in raising and removing a certain scaffolding, for which purpose an insufficient number of men had been provided, whereby, while plaintiff was exercising due care in pursuance of the order of said foreman, said scaffolding slipped and fell against plaintiff, and he was thereby greatly and permanently injured."

Jones was not served with summons in the case until April 24, 1900. Thereafter a demurrer was interposed by Jones to the original declaration. While this demurrer was pending, plaintiff in error, on May 25, 1900, filed two additional counts. On February 15, 1902, demurrers were sustained to the original declaration and the additional counts,

and the plaintiff in error, on February 19, 1902, filed an amended declaration consisting of two counts. The first count of the amended declaration differed from the original declaration in that it alleged that the plaintiff was "subject to the directions of a certain foreman of defendants, whose directions he was required to obey," and that "defendants, by their foreman, negligently directed plaintiff to assist in raising and removing a certain scaffolding, for which purpose an insufficient number of men had then and there been provided by defendants, Illinois Steel Company and John H. Jones." The second count of the amended declaration alleged that "it was the duty of defendants to exercise reasonable care to furnish a sufficient number of persons to perform the work required with reasonable safety, so that plaintiff would not be unnecessarily exposed to danger; that defendants did not exercise such care, but, on the contrary, negligently failed to furnish a sufficient number of persons to raise and remove a certain scaffolding which defendants then desired to have raised and removed, which fact defendants well knew or in the exercise of ordinary care and diligence ought to have known, and of which fact plaintiff had no notice or knowledge, and by reason of the failure of defendants to furnish a sufficient number of persons to perform the work of raising and removing said scaffolding, and while plaintiff was engaged, as aforesaid, in assisting to raise and remove said scaffolding, and was in exercise of due care, said scaffolding slipped and fell against plaintiff," whereby he was injured. Jones pleaded the general issue and the Statute of Limitations to both counts of the amended declaration. A demurrer, interposed by the plaintiff to the pleas of the Statute of Limitations, was sustained. The defendant stood by his pleas, and a trial was had before a jury upon the amended declaration and the plea of not guilty, which resulted in a verdict for the plaintiff against Jones, the suit having been dismissed as to the Illinois Steel Company during the trial of the cause. Judgment was rendered

by the superior court upon the verdict and Jones appealed to the Appellate Court for the First District, where the judgment of the superior court was reversed without remanding the cause, on the ground that the amended declaration stated a new cause of action against Jones, and for that reason the pleas of the Statute of Limitations presented a complete defense to the cause of action stated in the amended declaration. From that judgment of the Appellate Court plaintiff in error has prosecuted this appeal. It is not assigned as error that the Appellate Court, upon reversing the judgment, did not remand the cause.

The amended declaration was not filed until more than two years after the plaintiff in error had sustained the injuries for which he brought this suit. Therefore, unless the original declaration stated a cause of action against Jones, the pleas of the Statute of Limitations presented a complete defense to the cause of action set forth by the amended declaration. *Eylenfeldt v. Illinois Steel Co.* 165 Ill. 185; *Foster v. St. Luke's Hospital*, 191 id. 94.

In determining the question whether the original declaration stated a cause of action against Jones, all intendments and inferences that may reasonably be deduced from the facts stated in the pleading are in its favor, (*Sargent Co. v. Baublis*, 215 Ill. 428,) and if, so construed, it discloses a cause of action against Jones, although defectively stated, the Statute of Limitations is not a bar.

The suit was brought against Jones and the Illinois Steel Company. The allegations against one, only, of the defendants cannot be considered in determining whether the declaration discloses a cause of action against the other. Any negligence charged against the Illinois Steel Company alone cannot be imputed to Jones.

After stating that the relation of master and servant existed between the defendants and the plaintiff, the declaration charges that because of such relation it was the duty of the defendants to have seen that nothing should be done

which would unnecessarily expose plaintiff to danger, but that the defendants disregarded such duty and did not see that nothing was done which would expose plaintiff to danger, nor did they exercise reasonable care for the safety of plaintiff. Thus far the declaration attempts to set out some vague and uncertain duty which both defendants owed to the plaintiff and a breach of such duty by both defendants. This is not sufficient in order to disclose a cause of action. The specific act or omission relied upon as constituting the breach of duty must be stated in the declaration in order that a cause of action may appear therefrom, such as that the master failed to use reasonable care to furnish a reasonably safe place in which to work, or to furnish reasonably safe machinery, tools or appliances, or a sufficient number of men, or to warn an inexperienced servant of certain dangers connected with the work which he is required to perform. In *Wells v. O'Hare*, 209 Ill. 627, it is said: "A declaration to recover for negligence must allege the negligence or omission relied upon to give the right to recover;" and in *City of Chicago v. Selz, Schwab & Co.* 202 Ill. 545, in discussing the question whether a count stated a cause of action, the court says: "The count does not even charge negligence, generally, in the doing of a specific act, and does not disclose a cause of action."

The general breach of duty that the defendants did not see that nothing was done which would unnecessarily expose plaintiff to danger is, however, limited and particularized by alleging that the Illinois Steel Company negligently ordered the plaintiff to assist in raising and removing a certain horse or scaffolding, for which purpose an insufficient number of men had been provided. The only remaining question is whether it can be reasonably inferred from this specific charge of negligence that Jones was guilty of any breach of duty in that regard.

As far as any negligence might be implied from the giving of the order to an insufficient number of men, of which

the plaintiff was one, to raise and remove the scaffolding, such negligence is charged against the Illinois Steel Company alone, and by no reasonable intendment can it be extended to include Jones.

It is said, however, that the giving of the order is not the negligence counted on; that it is only alleged to rebut any presumption of assumed risk or want of due care on the part of the plaintiff, and that the real negligence disclosed by the declaration is that of providing an insufficient number of men to raise the scaffolding.

The clause, "for which purpose an insufficient number of men had been provided," is meaningless and unintelligible unless reference is made to what precedes it, viz., that "it, the said defendant Illinois Steel Company, by its said foreman, boss or superintendent, then negligently ordered plaintiff to help and assist in raising and removing a certain scaffolding." But, as we have hereinabove stated, the allegations against the Illinois Steel Company alone cannot be considered in determining whether the declaration states a cause of action against Jones. Therefore, conceding that the real negligence charged is that of providing an insufficient number of men, we think that it is so dependent upon that part of the charge which refers to the Illinois Steel Company alone, as to necessarily lead to the conclusion that the declaration charges that the Illinois Steel Company, and not Jones, had provided an insufficient number of men.

In our opinion the original declaration failed to state any cause of action against Jones, and the superior court should have overruled the demurrer to the pleas of the Statute of Limitations.

The judgment of the Appellate Court will therefore be affirmed.

Judgment affirmed.

JOSEPH BROWN

v.

WILLIAM B. WHITE.

Opinion filed February 21, 1906.

EVIDENCE—*when admitting a receipt for money is not harmful error.* In assumpsit to recover the balance alleged to be due on a sale of jewelry, admitting in evidence a receipt for \$3000 from a wholesale house to the plaintiff for jewelry sold and a certificate stating that he had good title is not harmful error, even though the jewelry covered by the receipt and certificate is not shown to be the jewelry sold by the plaintiff to the defendant, where the only contested issue in the case is whether the defendant agreed to pay \$500 for the jewelry, or \$3300, as claimed by the plaintiff.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. M. KAVANAGH, Judge, presiding.

LEO KORETZ, for appellant.

FREDERICK DUFFY, for appellee.

Mr. JUSTICE SCOTT delivered the opinion of the court:

William B. White, the appellee, obtained a judgment in the superior court of Cook county against Joseph Brown, the appellant, for \$2800, which judgment has been affirmed by the Appellate Court for the First District. The cause was submitted to the superior court for trial without the intervention of a jury. The controversy arises out of a sale of jewelry by appellee to appellant. Appellee contends that he was to receive \$3300 for the jewelry and that only \$500 of that amount has been paid, while appellant claims that the appellee sold him the jewelry for \$500, which he paid at the time the jewelry was turned over to him.

Appellant urges that the finding of the superior court and Appellate Court is against the weight of the evidence,

and that the amount for which judgment was rendered in the superior court is excessive. Those questions cannot be considered here. The judgment of the Appellate Court is final as to each. *Consolidated Coal Co. v. Peers*, 150 Ill. 344; *Westville Coal Co. v. Schwartz*, 177 id. 272; *Meyer v. Purcell*, 214 id. 62.

For the purpose of showing that he was the owner of the jewelry at the time of the sale to the defendant, the plaintiff offered in evidence a receipt from a wholesale jewelry firm showing payment of \$3000 by the plaintiff for a lot of jewelry, and a certificate made by the same firm stating that the plaintiff had good title and right to sell such jewelry. Both purported to have been made prior to the time of the sale by White to Brown, and the former testified that he received them at the time he purchased the goods in question. No particular description of the jewelry was contained in either document. The court, over the objection of the defendant, admitted both in evidence, and it is here urged that the action of the court in that regard was error, because it was not proved that the jewelry mentioned in the receipt and certificate was the same as that sold by the plaintiff to the defendant.

We think the testimony of White shows that this receipt and certificate were issued by the wholesale firm for the identical goods which were sold by White to Brown. However, if they did not refer to that jewelry their admission in this case was harmless error, in view of the fact that the only contested issue in the case is whether the defendant agreed to pay \$500 for the jewelry, as he claims, or \$3300, as claimed by the plaintiff, and the receipt and certificate did not purport to throw any light on that issue.

No other reasons are suggested by appellant for reversing the judgment of the Appellate Court. That judgment will therefore be affirmed.

Judgment affirmed.

HENRY H. GAGE*

v.

THE PEOPLE *ex rel.* John J. Hanberg, County Treasurer.

Opinion filed February 21, 1906.

1. SPECIAL ASSESSMENTS—*extent to which section 42 of Local Improvement act applies to all assessments.* Section 42 of the Local Improvement act, in so far as it fixes the time when the clerk shall issue the warrant to the collector, applies to all assessments, whether payable in installments or in one payment.

2. SAME—*assessment not delinquent until section 84 of Local Improvement act has been complied with.* A special assessment is not delinquent until after the certificate of the cost and final completion of the work has been filed, as required by section 84 of the Local Improvement act, and an application for judgment of sale made before such section is complied with cannot be maintained.

APPEAL from the County Court of Cook county; the Hon. ORRIN N. CARTER, Judge, presiding.

F. W. BECKER, for appellant.

ROBERT REDFIELD, and JOHN M. O'CONNOR, (JAMES HAMILTON LEWIS, Corporation Counsel, of counsel,) for appellee.

Mr. JUSTICE WILKIN delivered the opinion of the court:

At the June term, 1905, of the county court of Cook county the county collector made application for judgments and orders of sale against appellant's property for delinquent special assessments, as follows: On warrant No. 30,469, for a delinquent sidewalk assessment on South Ridgeway avenue; on warrant No. 30,512, for the third installment for the sewer in Addison street; and on warrant No. 25,773, for the fourth and fifth installments for paving Fortieth avenue, all in the city of Chicago. To these applications objec-

*Consolidated case, being Nos. 4504, 4509 and 4513.

tions were filed by the appellant that sections 42, 61 and 84 of the Local Improvement act had not been complied with. These objections were in each case overruled and judgments and orders of sale entered. On appeal to this court the cases have been consolidated and considered as No. 4509.

The petition for the assessment on warrant No. 30,469 was filed January 11, 1901. The date of the first voucher was June 30, 1903, but the certificate of this fact was not filed until December 14, 1903, and no certificate of the cost of the improvement was filed until after the date of the hearing upon the application for judgment and order of sale, but on August 3, 1905, appellee was permitted to file a certificate which showed the amount of the original assessment to be \$6661.93 and the total cost of the work to be but \$3560.12, for which latter amount the revised assessment was confirmed. The petition on warrant No. 25,773 was filed March 12, 1900, and the work was completed May 21, 1901. The date of the first voucher was February 19, 1901. The certificate of the completion of the work was not filed until August 3, 1905, after the application for judgment and order of sale, and it showed the original assessment to be \$148,000 and the total cost of the work to be but \$129,772.57. The petition for the assessment on warrant No. 30,512 was filed on May 11, 1901, and the work was completed December 31, 1902. The first voucher was issued May 16, 1902, and the certificate of that fact filed in the county court on February 6, 1903. At the time of the hearing of the application for judgment and order of sale no certificate of the cost of the work had been filed in the county court, but on August 3, 1905, appellee was permitted, over the objection of appellant, to file such certificate showing the original assessment to be \$69,015.63 and the total cost \$74,929.95, showing a deficiency of \$5914.32.

Section 42 of the Local Improvement act (Hurd's Stat. 1903, p. 400,) provides that the first installment shall be due on the second day of January next after the date of the first

voucher, and the board of local improvements shall file in the office of the clerk of the court in which the assessment was confirmed, a certificate of the date of the first voucher, and the amount thereof, within thirty days after the date of issue, and all interest shall run from the date of the first voucher. Section 61 provides that within thirty days after the filing of the report of the amount and date of the first voucher, as provided in section 42, the clerk shall certify the assessment roll to the municipal collector, together with the warrant for the collection of the assessment. Section 63 provides that the collector shall give thirty days' notice of the assessment being due. Section 65 provides that on or before April 1 in each year the municipal collector shall make report to the general officer of the county authorized to apply for judgment on delinquent assessments due, and such officer shall make application for judgment and order of sale. Section 84 provides that within thirty days after the final certificate and acceptance of the work the board of local improvements shall cause the cost thereof to be certified to the court, and if the total amount assessed exceeds the cost, such assessment shall be abated and the judgment reduced proportionately. Upon the filing of this report the court shall give notice of the hearing as to the truth of the allegation of the petition.

Counsel for appellee seem to contend that these are what they call "flat assessments,"—that is, assessments payable not in installments,—and therefore section 42 has no application to the case. This statement is not supported by the record either on warrant No. 30,512, which was for the third installment for the sewer, or on warrant No. 25,773, which was for the fourth and fifth installments for paving Fortieth avenue. The other case seems to have been a flat assessment. As to the assessments payable in installments, section 42 fixes the date from which the installments are to draw interest, and also the date when the clerk shall issue the warrant to the collector, as required in section 61. This latter object we think applicable to all assessments. The section

was not complied with as to either object, but there being nothing in this record to show that appellant was charged interest on any of the installments or to show from what date interest began to run, he was not injured by the failure to comply with the former provisions, and the only effect of the omission to comply with the section would be to postpone the time within which he was required to pay the assessments, which is not shown to have resulted in any injury to him.

The more serious question arising in each of the consolidated cases is the failure to comply with the requirements of section 84, which we regard as of substantial importance to the tax-payer. By its provisions he is given an opportunity, before he pays an assessment, to have the court pass upon the cost of the improvement, so that if the cost is less than the assessment he may have the benefit of the rebate and only be required to pay his share of the actual cost of the work. He is thereby relieved from the payment of a larger sum than the actual cost of the improvement, and compelled to await the pleasure of the municipal authorities to rebate to him the excess. The requirements of section 84 were not complied with until after the application for judgment, and upon the hearing the court permitted the report therein provided for to be made. In two of the assessments, as above shown, there were substantial reductions, and the appellant was entitled to the benefit of the same. The section requires the reports to be made within thirty days after the completion of the work, and, taking all of the foregoing sections together, it was evidently the intention of the legislature that the rebates should be made before the tax-payer was required to pay assessments. Where the assessment is payable in installments, the first falls due January 2 after the date of the first voucher, and it must be delinquent on April 1 following, in order that the municipal collector can legally report that fact to the county collector.

Inasmuch, therefore, as the requirements of section 84 had not been complied with when the application for judg-

ment and order of sale was made at the June term, 1905, the appellant was not in default and the assessments were not properly treated as delinquent, he having had no opportunity or notice to pay amounts for which he was actually liable. Section 84 is mandatory, the language being, "the intent and meaning hereof being that no property owner shall be required to pay to the collector a greater amount than his proportionate share of the cost of said work and of the interest that may accrue thereon." No excuse is offered for the failure of the appellee to comply with this section of the statute, and in each case there was ample time, after the completion of the work, to file the required report, so that appellant could have had an opportunity to pay that for which he was liable before the filing of the application for judgment.

The objection that section 84 had not been complied with should have been sustained. Appellant should be given until January 2, 1906, to pay these assessments, and no application for judgment can be legally made until after that date.

The judgment of the county court will be reversed and the cause will be remanded for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

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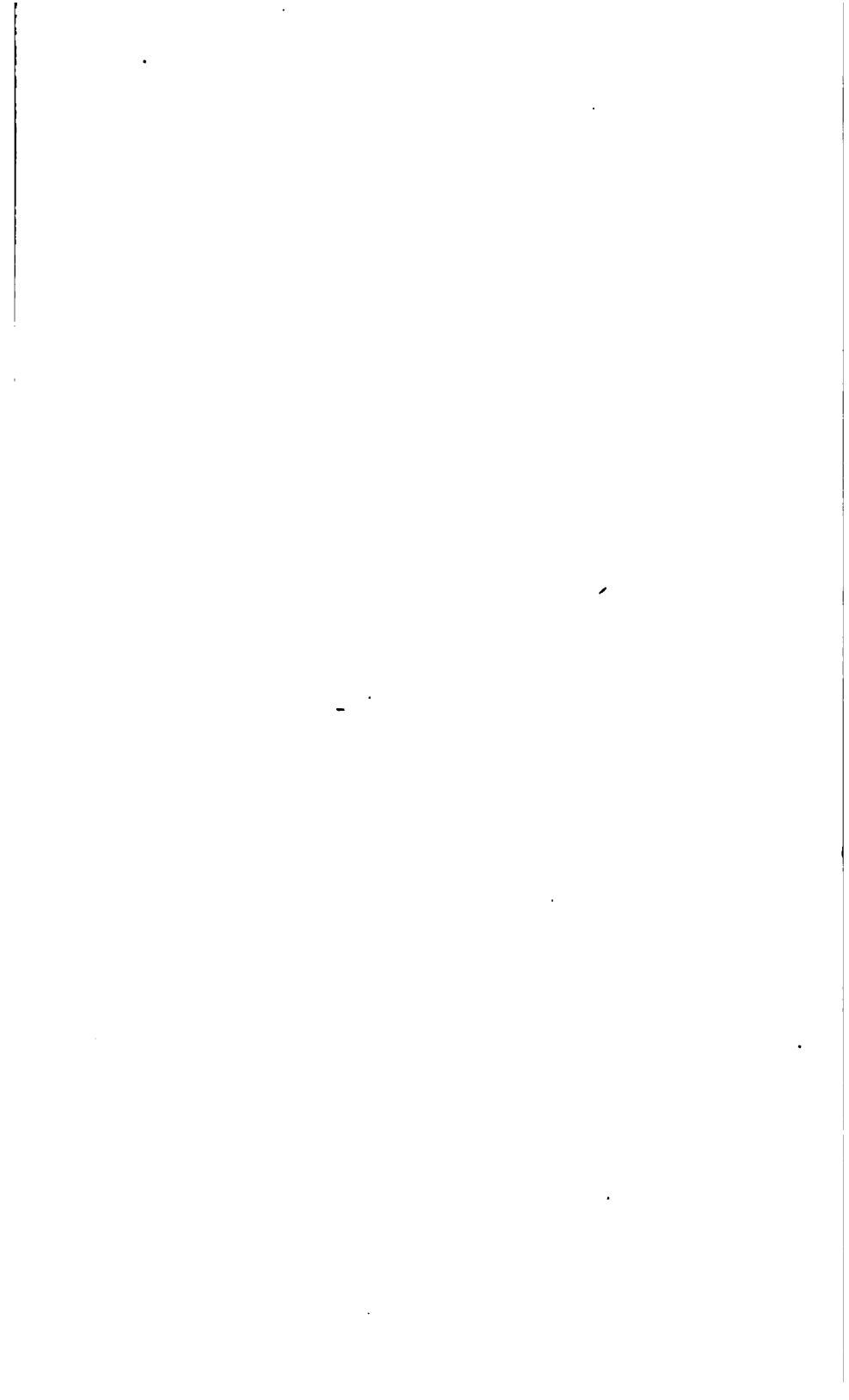


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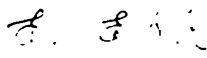
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